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Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 232.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN,
Appellant,

vs.

RICHARD MAYER, EDWIN REIS, KARL B. STRAUSS, *et al.*, ETC.

No. 233.

RICHARD MAYER,
Appellant,

vs.

HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN; EDWIN REIS, KARL B. STRAUSS, *et al.*, ETC.

No. 234.

EDWIN REIS, KARL B. STRAUSS, AND ANNY REIS, ETC.,
Appellants,

vs.

RICHARD MAYER AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR EDWIN REIS, *ET AL.*

JOHN CALDWELL MEYERS,
Attorney for EDWIN REIS, *et al.*

JOHN W. DAVIS,
Of Counsel.

Page 14

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

CONTENTS.

	PAGE
Previous Decisions in these Cases	1
Grounds for the Jurisdiction of this Court	2
Statement of Facts	2
Decision of the District Court	11
Decision of the Circuit Court of Appeals	12
Theories and Contentions of the Parties	13
Specification of Assignment of Errors	15–20

ARGUMENT:

FIRST. The Court erred in deciding that any sum in marks *was due* Richard Mayer as of April 6, 1917. The assets and liabilities of the partnership must be ascertained as of that date, solely for the purpose of limiting Richard Mayer's liability in a continuing business, but not to effect distribution or division of the partnership assets as of that date. No accounting and determination of the distributive shares of the partners could be had until the trial 22

The District Court and Circuit Court of Appeals proceeded on the theory that, upon dissolution, Richard Mayer became a creditor of the partnership 23

Dissolution does not create a debtor and creditor relationship among the partners. 27

The assets and liabilities of the partnership must be ascertained as of April 6, 1917, solely for the purpose of limiting Richard Mayer's liability in a continuing business, but not to effect distribution or division of the partnership assets as of that date 33

No accounting and determination of the distributive shares of the partners could be had until the trial 36

PAGE

SECOND. The account of the German partners shows that they have accounted for everything they received in the currency in which they received it. The loss which has been sustained by the partnership arises exclusively from the depreciation of that currency..... 37

THIRD. The Court erred in translating Mayer's distributive share computed in marks into dollars at the par of exchange ($.2382) for the purpose of rendering a decree in dollars..... 42

FOURTH. The Court erred in holding and ruling that the sum of marks 956,814.31 set aside by the German defendants for reserves should not be included among the liabilities, to the payment of which the defendant, Richard Mayer's share should contribute. 500,000 marks of said reserves constituted a partnership liability.... 49

FIFTH. The Court below erred in failing to hold and rule that the claims of Ely, Leiser, Sanft and Heinstein for percentages of profits of the firm constitute a liability of the firm, and in failing to make provision in the decree for the payment of these liabilities..... 52

SIXTH. The Court below erred in disallowing the sum of 266,432.40 marks paid by the German partners for taxes and the sum of 50,400 marks paid by the German partners to Mayer's relatives at his request..... 55

SEVENTH. The Court erred in ruling that the defendant Richard Mayer is accountable for the sum of only $828,072.72..... 56

PAGE

EIGHTH. The Court erred in allowing Mayer's claim for the premium paid by him in connection with the bond he furnished to the Alien Property Custodian and also in allowing counsel fees 57

NINTH. The correct computation of Richard Mayer's distributive share of the proceeds of all the assets 58

LIST OF CASES

PAGE

Adams v. *Cordis*, 8 Pick. 260 ..... 23, 43, 45
Alcock v. *Hopkins*, 6 Cush. 484 ..... 23, 43
Anderson v. *Allen*, 9 S. & R. 241 31
Arnold v. *Arnold*, 90 N. Y. 580, 583 30

Birge Forbes Co. v. *Heye*, 251 U. S. 317, 321 46
Bradley v. *Bingham*, 137 Mass. 535, 546 61
Brown v. *Hiatts*, 15 Wall. 177 ..... 24, 60
Buchanan v. *Curry*, 19 Johns. (N. Y.) 137 35
Burgess v. *Alliance Ins. Co.*, 10 Allen 221 ..... 23, 43

S. S. "Celia" v. *S. S. "Volturno"* (1921), L. R. 2 App. Cas. 544 46
Clay v. *Field*, 138 U. S. 464, 473 ..... 26, 34, 35
Coe, In re, 157 Fed. 308 33
Commonwealth v. *Haupt*, 10 Allen 38 ..... 23, 43
Crabtree v. *Randall*, 133 Mass. 552 61
Cramer v. *Arthur*, 102 U. S. 612 47
Cramer v. *U. S.*, 7 Ct. Cl. 302 ..... 32, 35
Crawshay v. *Collins*, 15 Ves. 226 28

Dante v. *Minnigio*, 298 Fed. 845 46
Dexter v. *Arnold*, Fed. Cas. No. 3855, 3 Mason 289 61
Di Ferdinando v. *Simon Schmidts & Co.* (1920) 3 K. B. D. 409 46
Douglas v. *U. S.*, 14 Ct. Cl. 1 35

Eumaeus, The, 51 L. J. 7 (Adm. Ct.), 29 Harvard L. Rev. 31

Freeman v. *Freeman*, 136 Mass. 260, 263, 264 28

Goldsboro v. *McWilliams*, Fed. Cas. No. 5518 31
Gommersall v. *Gommersall*, 96 Mass. 60 31
Grant v. *Fletcher*, 283 Fed. 243 ..... 32, 58
Grant v. *Maxwell*, Fed. Cas. No. 5699 47
Griswold v. *Waddington*, 16 Johns. 438 35
Guinness v. *Hicks*, Nos. 80 and 81 (U. S. Sup. Ct.); October Term 1925 46

PAGE

Hargrave v. *Creighton*, 1 Woods, 489; Fed. Cas. No. 6064 45
Hoare v. *Allen*, 2 Dallas 102..... 24
Hoppe v. *Russo-Asiatic Bank*, 235 N. Y. 37..... 46
"Hurona" The, 268 Fed. 910..... 46
Hussey v. *Farlow*, 9 Allen, 263..... 23, 43

Insurance Company v. *Davis*, 95 U. S. 425..... 36

Jackson v. *Chase*, 98 Mass. 286..... 41

Katcher v. *Amer. Express Co.*, 94 N. J. L. 165..... 46

Lamalere v. *Caze*, Fed. Cas. 8003..... 31
Lodge v. *Spooner*, 8 Gray 166..... 23, 43

McNair v. *Ragland*, 16 N. C. (1 Dev. Eq.) 520..... 41
Martin v. *Franklin*, 4 Johns. 124.....23, 43, 45
Martin v. *Hobson*, L. R. 8 Ch. 401..... 31
Mayer v. *Garran* (D. C.) 270 Fed. 229..... 3, 26
Mayer v. *Garran*, (C. C. A.) 278 Fed. 27.....3, 5, 25, 37
Miller v. *Humphrey*, 7 Fed. (2nd) 330..... 46
Miller v. *Lord*, 11 Pick. 11, 26..... 61
Milliken v. *Slote*, 1 Nev. 585, 590..... 31
Moore v. *Huntington*, 17 Wall. 417, 423..... 32, 33
Moore v. *Rawson*, 185 Mass. 264..... 61

Page v. *Levenson*, 281 Fed. 555..... 46
Pote v. *Phillips*, Fed. Cas. No. 11316..... 31
Powell v. *Railway Company*, 36 Fed. 726, 730..... 31

Reiser v. *Parker*, 1 Lowell 262..... 23, 43
Rice v. *Ontario S. B. Co.*, 56 Barb. 387..... 23, 43
Richardson v. *Bank of England*, 4 Myl. & C. 165, 172. 29, 30
Robinson v. *Hall*, 28 How. Prac. (N. Y.) 342..... 45

Simonoff v. *Bank*, 279 Ill. 248..... 46
Skofield v. *Day*, 20 Johns. 102..... 23, 43
Stein & Co., In re, 127 Fed. 547, 549..... 33
Stevenson & Sons, Ltd. v. *Aktiengesellschaft, etc.*, (1918) A. C. 239 35
Swanson v. *Cooke*, 45 Barb. 574..... 23, 43

PAGE

Thorington v. *Smith*, 8 Wall. 1 45

U. S. v. *American Gold Coin*, 24 Fed. Cas. 780 (No. 14,439) 45

U. S. v. *Grossmayer*, 9 Wall. 72 36

"Verdi", The, 268 Fed. 908 47

Wichita Mill etc. v. *Naamlooze, etc.*, 3 Fed. (2nd) 931 47

Zimmerman v. *Harding*, 227 U. S. 489, 494 32

TEXTS

20 Amer. and Eng. Encycl. 841 32
30 Cyc. 655, 659 ..... 28, 30
29 Harvard Law Review, 795 31
Lindley on Partnership 30, 31
Parsons on Partnership (4th Ed.) § 286 29
Story—Conflict of Laws (8th Ed.) p. 426 ..... 45, 47
Story on Partnership (7th Ed.)
Art. 221 27
Art. 325 28
Art. 326-328; 344 29
Art. 348*a* 29
Art. 351 32
Sutherland on Damages (4th Ed.) Sect. 212 41

STATUTES

Judicial Code.
Section 241 (c. 241, 36 Stat. 1157) 2
Act of February 13, 1925 (43 Stat. 936) 2
Trading with the Enemy Act.
Section 2 (c. 106, 40 Stat. 411) 36
Section 17 (c. 106, 40 Stat. 425) 2
28 Stat. 552 47

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No. 232

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HOWARD SUTHERLAND, Alien Property Custodian; EDWIN REIS, KARL B. STRAUSS, *et al.*, etc.

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EDWIN REIS, KARL B. STRAUSS, and ANNY REIS, etc., Appellants,

vs.

RICHARD MAYER and HOWARD SUTHERLAND, as Alien Property Custodian.

BRIEF FOR EDWIN REIS, *ET AL.*

Previous Decisions in these Cases.

The opinion of the Circuit Court of Appeals in these cases is reported in 1 Fed. (2nd) 419. The opinion of the District Court has not been reported, but may be found at pages 68 *et seq.* of the Record.

Grounds for the Jurisdiction of this Court.

Case 232 is before this court on appeal by the Alien Property Custodian, plaintiff in the District Court, from the final decree in the Circuit Court of Appeals for the First Circuit, dated September 18, 1924 (R. 155-156), affirming with modification the decree of the District Court of the United States for the district of Massachusetts, entered on October 2, 1923 (R. 66).

Cases 233 and 234 are before the court upon cross appeals prosecuted, respectively, by Richard Mayer, a defendant in the District Court, and by defendants Edwin Reis, Karl B. Strauss and Anny Reis, as trustees for Anneliese Reis and Ruth F. Reis, from the same decree of the Circuit Court of Appeals for the First Circuit (R. 155, 156). These appeals were allowed in December, 1924 (R. 156, 159, 162), and therefore prior to the act of February 13, 1925, and were prosecuted pursuant to Section 241 of the Judicial Code (Sec. 241, 36 Stat. 1157) which had existed at the time of such appeal.

The District Court's jurisdiction is founded under Section 17 of the Trading with the Enemy Act (Sec. 17; 40 Stat. 425) by which section the provisions of the Judicial Code with reference to appeals were extended to the provisions of the Trading with the Enemy Act.

Statement of Facts.

These cases were begun by suit brought by Thomas W. Miller, as Alien Property Custodian of the United States, against Richard Mayer, of Boston, Massachusetts; Edwin Reis and Karl B. Strauss, of Heidelberg, Germany, surviving partners of the firm of Reis & Co., Estate of Ludwig Reis, lately of Mannheim, Baden, Germany; Anny Reis, individually and as trustee for Anneliese Reis and Ruth F. Reis, both her minor children, of said Mannheim; the Richard Mayer Company and the Anglo-American Cotton Company, both corporations duly organized under the laws of the Commonwealth of Massachusetts.

Richard Mayer was the American partner of the German

firm of Reis & Co. and was domiciled in Boston, having charge of the firm's branch in that city. In 1914 and 1915 Mayer had organized two Massachusetts corporations, the Richard Mayer Company and the Anglo-American Cotton Company, capitalizing them with assets of Reis & Co. in his hands, and holding or controlling, through dummies, their capital stock. After the outbreak of the war between the United States and Germany the Alien Property Custodian in 1918 seized as enemy property the capital stock of these corporations and other assets and securities of the partnership. Mayer filed a claim for the return of the property, alleging a dissolution of the partnership on the declaration of war, that he had taken all the property over as his own, and that he believed the German partners had no claim on him. His claim being refused, Mayer filed a bill in equity against the Custodian, pleading an alleged dissolution agreement of February 7, 1917 (determined by the court to be "void and of no effect"), repeating his claim of ownership of the American assets, and asserting his right to the possession of the American assets to secure his lien upon a partnership accounting. In the case of *Mayer* vs. *Garran* (278 Fed. 27, modifying and affirming 270 Fed. 229), the Circuit Court of Appeals for the First Circuit (Judge Johnson, the trial judge in the present suit, delivering the opinion of the court) held that the partnership was dissolved upon the outbreak of war, April 6, 1917; that, after the declaration of war, all commercial intercourse between the American and German partners was unlawful, and opposed to the public policy of the United States; that under the partnership articles Mayer was entitled upon distribution to have repaid him out of the assets of the partnership the amount of his capital investment, with interest, and also 20% of the net profits earned by the partnership and was liable for 20% of the losses; "that, upon the present state of the evidence, this court is unable to state an account as between the parties, or Richard Mayer and the Alien Property Custodian, there being no evidence of the actual value of the American property or of the German or English property, and there being no evidence of the liabilities of the firm;

* * * that the complainant on the dissolution of the partnership with the outbreak of war had a lien on the American assets and their proceeds for what was due him from the partnership on an accounting of the affairs of the partnership and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting; that the plaintiff is entitled to the immediate repossession of all property so seized and the net proceeds arising therefrom; that the plaintiff shall hold possession of the money and property so delivered to him under the terms and provisions of Section 8(*a*) of the Trading with the Enemy Act, and of the rights and duties in respect thereof which are set forth in paragraph 10 of this decree" (quoted in opinion of Circuit Court of Appeals, R. 150).

In June, 1922, such property as remained in the hands of the Alien Property Custodian was returned to Mayer, who thereupon filed with the Custodian a document or statement entitled an "Accounting" (see Exhibit A to answer of Richard Mayer, R. 27), alleging that there was no surplus to be paid over to that officer. This alleged account was deemed insufficient and rejected by the Alien Property Custodian, who thereupon instituted the present suit.

The bill in the present suit seeks an accounting by Richard Mayer and the German partners, respectively, of the cash value of partnership assets in their possession or subject to their control; prays that Richard Mayer be charged with all losses of partnership assets occasioned by his diversion and conversion thereof to his own use; that the amount due Mayer by the partnership be determined and established as of the date of final decree; and that Mayer thereupon be ordered to surrender to the Alien Property Custodian the surplus which shall remain out of the assets of the partnership of Reis & Co. in his hands, after the satisfaction of the amount, if any, due him upon a true and proper accounting, the bill praying that in determining the amount due him from the partnership, on accounting, the defendant Richard Mayer be credited with the value of his interest in the European assets of the partnership (R. 1-7).

The Alien Property Custodian is admittedly entitled to all of the American assets of the partnership except the distributive share of Richard Mayer. All the surviving German partners of the firm of Reis & Co., as well as the representative and beneficiaries of the estate of Ludwig Reis, the only deceased partner, have appeared and filed their answer to the bill of complaint herein, and have annexed to their answer (see Exhibit II to answer of Edwin Reis, *et al.*, R. 41) a full and true account of the European assets of the firm in their possession and subject to their control on April 6, 1917, and thereafter, and of Richard Mayer's interest therein, and have joined in the prayer of the bill that Richard Mayer be required to account for the partnership assets in his hands or subject to his control (R. 34-40).

The defendant Richard Mayer also answered, relying upon and annexing to his answer, as Exhibit A thereto, the statement (R. 27) which he had previously submitted to the Alien Property Custodian as an accounting, but which had been rejected by the Custodian.

The trial was had before Honorable Charles F. Johnson, Circuit Judge, sitting as District Judge, and continued five days, March 26 to 31, 1923 (R. 65). The trial court took judicial notice of the printed record in the Circuit Court of Appeals in the case of *Mayer* v. *Garvan,* 278 Fed. 27, together with the final decree entered therein on May 4, 1922, pursuant to mandate. Edwin Reis appeared and testified on the trial (R. 81 *et seq.*), producing the firm's books of account, which he had brought over from Germany and which included certain private records which had been withheld from Messrs. Price Waterhouse & Co. (see opinion of District Court, R. 69). Richard Mayer was in court but did not testify. A final decree was entered on October 2, 1923 (R. 66), the court having rendered its opinion on June 16, 1923 (R. 68), in accordance with which the decree was entered. From this decree appeals were taken to the United States Circuit Court of Appeals for the First Circuit by all parties. The said Circuit Court of Appeals affirmed the

decree with certain modifications (R. 155) in accordance with its opinion (R. 149), reported as *Miller* vs. *Mayer, et al.*, 1 Fed. (2nd) 419. From this decree of the Circuit Court of Appeals the present appeals are taken.

The firm of Reis & Co., prior to 1913, consisted of Edwin Reis and Ludwig Reis, residents of Germany, and Karl B. Strauss, a naturalized citizen of Great Britain, but a German by birth. This firm had succeeded to the business of dealing in cotton waste formerly conducted by the father of the Messrs. Reis. Richard Mayer was born in Germany, but took out naturalization papers in the United States in 1912. In 1898 he was sent to Boston by the firm of Reis & Co., and for some time acted as its agent, but subsequently left its employ and organized a similar business which he conducted on his own account. In 1913 he went to Germany and was admitted into the firm as an "additional, personal, liable partner". The partnership agreement was executed at Friedrichsfeld, Germany, and is in the German language, but a translation thereof is annexed as Exhibit A to the bill of complaint (R. 7). In the first paragraph thereof it is provided that Mr. Mayer shall make his domicile in Boston and conduct the American business of the partnership. The agreement also provided that Mayer should bring into the partnership the business which he had previously conducted in Boston with all its assets and liabilities, and which he guaranteed to inventory marks 200,000. After inventory this was credited to Mayer on the firm's private ledger at Friedrichsfeld (the only place where the capital investment of the partners was shown [R. 81]) at marks 206,054.02 (R. 57). By the partnership agreement Edwin Reis was required to contribute to the capital of the firm marks 1,179,845.03; Ludwig Reis marks 1,136,867.26 and Karl B. Strauss marks 348,313.24, these gentlemen guaranteeing in favor of Richard Mayer the correctness of this inventory. Mayer's capital contribution was therefore approximately 7% of the total capital contribution and invested capital of the firm, exclusive of the capital contribution made by Mrs. Wilhelm Reis, the special partner. The amount

of her contribution did not appear, but it was provided that she was to have interest on her investment, whatever it was, at 4½%, but should not participate in gain or loss. Each of the personally liable or general partners was to receive interest at 4½% upon the capital he furnished and a fixed salary (marks 16,000 per annum in the case of Richard Mayer) and was entitled to draw in the course of each partnership year from the firm an amount equal to his salary and the interest due on his investment. The participation in gain and loss was to be as follows: Edwin Reis 27½%; Ludwig Reis 27½%; Karl B. Strauss 25% and Richard Mayer 20%. Profits of the partnership were not to be withdrawn, but were to be credited to the capital account of the several partners.

Ludwig Reis died on January 10, 1918, leaving him surviving a widow and two children. The widow in her own right and as trustee for her minor children is a party defendant in the present action.

The "main seat" of the partnership was at Friedrichsfeld, Germany. The firm maintained branch offices in Germany, and in Manchester, England, and Boston, Massachusetts. Branch offices kept separate books for their own convenience, and functioned merely as buying and selling agencies for the principal office in Friedrichsfeld (R. 82). Inventories were made up from reports sent by the branch offices to Friedrichsfeld, and the balance sheets at Friedrichsfeld included inventories at Friedrichsfeld, Herzberg, Franzenthal, Boston and Manchester (R. 82).

After the outbreak of the war between England and Germany, the property in Manchester was seized by the English Alien Property Custodian and was sold, the firm obtaining nothing out of the assets in England. On the contrary there were debts of the English branch offices to English banks for which the Friedrichsfeld office had to stand good. To take care of this indebtedness the firm made a reserve on its books at Friedrichsfeld of about marks 700,000 to marks 800,000, but had to pay much more than this amount. Up to the date of trial marks 900,000 had been actually paid to

the clearing office according to the terms of the Treaty of Versailles, and it appeared that subsequent additional payments would be required to be made upon demand, the accounting with the English trustee made by the German partners prior to the date of the trial being only a temporary accounting. The total liability in connection with the English branch of the business was £35,000 (R. 82). In order to facilitate the accounting and so as not to leave open the unascertained liabilities in connection with the English branch which might be held to be a bar to an accounting, the German partners made a very substantial concession in assuming all responsibility for further payments that will have to be made in connection with the English debts. Mayer is forever released from further liability to contribute to this indebtedness (See: Exhibit II, R. 42).

By German law the outbreak of the war between the United States and Germany, did not dissolve the partnership, and thereafter the partnership continued to transact business at Friedrichsfeld, and to carry Richard Mayer as a partner on the books at the home office of the firm (R. 83). Mayer approved of this arrangement (R. 90). Likewise Mayer continued, up to the time the property was seized by the Alien Property Custodian (September, 1918), to carry on the business in this country in the same way as before, no attempt being made by Richard Mayer to liquidate the assets and state an account (R. 92, 93).

On December 31, 1916 the value on the firm's books, of the German assets, exclusive of liabilities, stood at marks 15,282,170.55 (R. 85) and the net value at marks 11,489,168.41 (R. 51). The value of the German assets on April 6, 1917 was not stated on the firm's books, inasmuch as no inventory was taken on that day, but the uncontradicted testimony of Edward Reis (R. 85) shows the book value of the assets to be practically the same on April 6, 1917 as on December 31, 1916. The accounting rendered by the German partners indicated the book value of Richard Mayer's share (his capital account) in the German assets of the firm to be on December 31,

1916, marks 2,107,499.89 (R. 53) and his share as of April 6, 1917 (which was computed by crediting to him his proportion of profits for the period December 31, 1916 to April 6, 1917 and debiting him with certain taxes and payments to relatives made for his account) amounted to marks 1,836,358.80 (R. 60). The actual value of his share after such credits and debits was marks 1,905,860.87 (R. 146).

The great bulk of the German assets on April 6, 1917 were cash, bills receivable and merchandise. Taking the statement of the assets it appears that lands, buildings, plants and machinery aggregated only a little over 848,000 marks out of something over 15,000,000 marks (R. 85). The merchandise, accounts receivable and investments of the firm were all turned into cash during the year 1917 (R. 43, 82). The plant at Herzberg was sold during the year 1919, and the plant at Franzenthal during the early part of 1920, each bringing on sale about twice book value, the increase in the purchase price over the book value being due to the depreciation of the mark (R. 83). On April 6, 1917, the book values of these two plants represented their actual values (R. 85). The Friedrichsfeld plant, whose book value on April 6, 1917, was marks 287,492.66, and whose actual value on said date was marks 635,028 (R. 146) had not been sold up to the time of trial and its value at that time was conceded by all the partners to be 81,000,000 marks, the increase in value likewise being due to the depreciation of the mark (R. 83). (Note—the figure "18,000,000 marks" at the top of page 83 in the Record is a typographical error, the correct figure is 80,000,000 marks—see Exhibit XIII, R. 146, 147). On the trial Edwin Reis testified that since April 6, 1917, the German partners had continued in the form of cash on deposit in banks a sum sufficient to pay out the capital interest of Mayer as shown by the books, and that they still had such an amount in the form of cash in German marks.

The firm's accounts were carried in marks. The firm had no fixed arrangement about figuring marks into dollars or dollars into marks, but had always used the actual rate

according to the rate of exchange existing at the time (R. 83; Defendant's Exhibit IV, R. 137). Mayer himself in 1916 in figuring with witness Laible the value of his share in the German assets employed the current rate of exchange (R. 93). There had never been any agreement of any kind between the partners as to the rate of exchange to be employed in the partnership account, nor had there ever been any agreement of any kind between the partners as to an accounting other than the written partnership agreement (R. 84).

Richard Mayer was in Germany in the latter part of the year 1914 at which time he looked over the books. The assets of the Boston branch were kept in marks on the partnership books in Friedrichsfeld until the latter part of 1914 or the early part of 1915, when regular reports were no longer received. The share of Richard Mayer of the profits was credited to him annually in marks on the books in the private ledger at Friedrichsfeld, Edwin Reis himself making the entries until 1916, a firm of chartered accountants (R. 86) making the entries thereafter.

Prior to the outbreak of the war about $2,500,000 was sent over to Richard Mayer by Reis & Co. for the purchase of cotton. A very large part of this was not needed by Mayer, and the German partners cabled frequently for the return of the money not needed, which amounted to more than $1.000,000. About $300,000 was returned, in the year 1915. The German partners demanded $600,000 continuously, but never received it (R. 90, 91). Counsel for Mayer conceded that the balance not remitted by Mayer to the German partners was a part of the assets in America.

It is conceded that the value of the American assets in the possession of Richard Mayer at the outbreak of war was $910,014.07 (Exhibit A to Answer of Richard Mayer, R. 31). The value of these assets at the time of trial amounted to only $828,072.72 (R. 34), the difference between the two figures being accounted for by the total loss of the assets of the Anglo-American Cotton Company (R. 31). This loss occurred

partly before the assets were seized by the Custodian and partly during the time he held them. At the trial counsel for the Alien Property Custodian consented to accept $828,072.72 as the correct figure for which Richard Mayer is accountable, on condition that the accounting proceed as of the time of trial, and that all losses of partnership property be apportioned equally among all partners (R. 81).

The German partners feel bound by the waiver of any surcharge, made by counsel for the Custodian, provided that waiver be not extended beyond the scope to which it was limited by counsel for the Custodian.

On the trial the District Court proceeded to state the account between the partners and to determine Richard Mayer's liability in the following manner (see opinion of District Court, R. 69-71).

Mayer's interest in German assets as shown by firm's books on December 31, 1916 (R. 53) marks	2,107,499.89
Add: 20% of actual value of lands, buildings and machinery on March 6, 1917 over book value (R. 146)	69,507.07
20% of reserves (R. 87)	191,362.86
20% of profits December 31, 1916 to March 6, 1917, admitted to be (R. 60)	45,686.31
Total Mayer's share in net assets in Germany on April 6, 1917 marks	2,414,056.12
Deduct: German taxes assessed on Mayer's partnership interest during years 1914, 1915 and 1916 and paid by the German partners after April 6, 1917 (R. 60)	266,432.40
Payments by German partners to Mayer's relatives in Germany after April 6, 1917 (R. 60)	50,400
Total Mayer's share in net assets in Germany after deduction and for which German partners must account as of April 6, 1917	2,097,223.72

This amount, *i. e.* marks 2,097,223.72, is converted by the District Court into United States dollars at the remarkable

exchange rate of one mark equals 23.82 cents, *i. e.* on a theoretical gold standard basis, (R. 72) and to the result in dollars ($499,558.69) is added 20% of the American assets, or $165, 614.54, and the result, $665,173.23, found to be Richard Mayer's share in all the assets of the firm (R. 73). Deducting this sum from the amount for which Mayer admitted his accountability, namely, $828,072.72, there was a surplus of $162,899.49 which the District Court ruled was to be returned to the Alien Property Custodian to be administered under the Trading with the Enemy Act (R. 73).

The decree of the District Court required that Richard Mayer pay this sum to the Alien Property Custodian less $5,600 or 80% of the amount of $7,000 theretofore deposited with Mr. McClennen, as an officer of the court, for the purpose of paying any judgment that might be recovered by Julius Laible in a pending suit against Reis & Co. The decree also provided that Richard Mayer should pay to Mr. McClennen as an officer of the court $14,000 as security to satisfy 20% of any judgment that might be recovered in the suits at law brought by the United States of America against the Richard Mayer Company and against Richard Mayer *et al.*, individually, to recover the amount of $62,595.03 paid by the War Risk Insurance Bureau in consequence of the loss of cargo of the Steamship "Carolyn", with interest from October 17, 1916. Any recovery in this case was to be paid 20% by Richard Mayer and 80% by the Alien Property Custodian (R. 66).

On appeal the Circuit Court of Appeals affirmed the opinion of the District Court with the following modifications (R. 149, 154):

It disallowed tax payments made by the German partners for Mayer's account and aggregating.....	marks	266,432.40
Also the payments to relatives (except 600 marks paid before the war) aggregating	marks	49,800.00
It allowed Mayer's claim for $4,000 covering premium on bond given at		

the time of the restoration of property by the Custodian.....	$4,000.00
Also his claim for counsel fees and other disbursements incurred in the suit of *Mayer* vs. *Garvan*—not yet determined.	

The effect of such disallowances has been to increase Mayer's share in the German assets by marks 316,232.40 or $76,326.56, if the rate of 23.82 cents per mark be employed. Crediting this amount and the bond premium and attorney's fees against Richard Mayer's liabilities to the Custodian, his net accountability would be reduced to considerably less than $80,000.

The accounting on the trial was the first accounting between the partners—prior to the trial no accounting was ever made or attempted by the partners or by Richard Mayer nor was an accounting possible.

Theories and Contentions of the Parties.

The assignments of error indicate not only the dispute of the parties as to the propriety of crediting the German partners and Richard Mayer with certain payments made by them respectively but also their fundamental differences as to the true and proper theory and basis of partnership accounting, and as to the true and proper rate of exchange to be employed in converting marks into dollars.

The Alien Property Custodian and the German partners agree as to the manner in which the accounting should be stated, differing only as to certain minor items of charges and credits.

The Alien Property Custodian and the German partners contend that the accounting must be ascertained and stated upon the value of the partnership assets or their proceeds at the time of trial or at the time the account is determined and stated by the court, since this proceeding is the first occasion when all the parties and the evidence necessary for an accounting have been available for that purpose; that the

American assets still belong to the dissolved partnership and are 80% enemy owned; that the German assets or their proceeds still belong to the partnership and are 80% enemy owned; that the depreciation in the value of the German assets caused by the depreciation in the value of the marks by which their value is measured, and of which they principally consist, must be shared ratably by all the partners, including Mayer, until final accounting and distribution; that Mayer is likewise entitled to the benefit of any appreciation in the value of the German assets until such final accounting; that the record contains uncontroverted evidence establishing such values, and that the account should be stated as of March 26, 1923, when for the first time the parties came together for an accounting, as follows:

The present value of the American assets for which Mayer admits his accountability (Exhibit A to Mayer's Answer, R. 34) is	$828,072.72
From this sum deduct Mayer's 20% interest therein, or	$165,614.54
Leaving, as the Custodian's share of the American assets	$662,458.18
From this sum should also be deducted the value of Mayer's interest in the German assets, which on April 6, 1917, had been marks 1,905,860.87 (R. 146) (District Court figure M. 2,097,223.72), but which on March 26, 1923, the date of the accounting, were worth	‡M. 18,206,591.22
The value of Mayer's interest in the German assets, translated into dollars on the same date when the account was stated at the rate of exchange of .0048 cents to the mark (R. 80, 151), is	$873.92
Added to the value of Mayer's interest in the American assets or	$165,614.54
Mayer's total interest is	$166,488.46

Deducting this sum from the amount with which Mayer is admittedly chargeable, or	$828,072.72
The Custodian's ascertained share in the American assets, on the day of accounting, was	$661,584.26

‡ Exclusive of interest, if allowable, and exclusive of profits earned subsequent to March 6, 1917, and prior to the accounting.

Defendant Mayer contends that the partnership was terminated by the outbreak of war; that the assets must be valued as of that date; that the value of his share so determined must be deemed a *debt* due on April 6, 1917, by the German partners to him, though no accounting was or could be had on that date; that the value or amount in dollars of his share of the German assets must be determined by the "true value" (sic) of the mark, *i. e.,* the theoretical gold par value of the mark (23.82 cents) and not by the commercial exchange value of the mark at the time of the accounting (.0048 cents). He of course maintains the propriety of the allowance of various credits and disallowance of various debits to his account affirmed by the Circuit Court of Appeals, but also contends that he should have been allowed interest for loss of use of the American property during the period of its possession by the Alien Property Custodian.

All parties feeling aggrieved by the decree or some of the provisions thereof, have appealed to this court, and in connection with their respective appeals have filed the following assignments of error:

The Alien Property Custodian assigns error by the court (R. 157).

1. In holding and ruling that Richard Mayer's distributive share in the European assets of the partnership of Reis & Company ascertained in German marks should be translated into American dollars at the rate of $.2382.

2. In failing to hold and rule that the number of German marks payable to Richard Mayer as his dis-

tributive share in the European assets of the partnership must be translated into dollars at the rate of exchange current at the date when the accounting was stated in this proceeding.

3. In failing to hold and rule that the Alien Property Custodian was entitled to $661,584.26 as the enemy share of the American assets of the partnership of Reis & Company.

4. In holding and ruling that the German partners after April 6, 1917 continued the German business of the partnership on their own account, treating the German assets as their own.

5. In failing to hold and rule that Richard Mayer continued the American busineses of the partnership after April 6, 1917 as a going business on his own account without authority therefor from his partners.

6. In holding and ruling that the intrinsic value of the German marks in which the German assets of the partnership was measured was the amount of gold contained in .2382 of an American dollar.

7. In holding and ruling that Richard Mayer is entitled to charge against the firm assets in his hands, the sum of $4,000 paid out by him as a premium on a surety bond.

8. In holding and ruling that Richard Mayer was not chargeable on a partnership accounting for the sum of 266,432.40 marks paid by the German partners as taxes upon Mayer's interest in the partnership property in Germany assessed during the years 1914, 1915, and 1916.

9. In holding and ruling that Richard Mayer was not chargeable with the sum of 50,400 marks paid by the direction of Mayer to his relatives in Germany.

10. In holding and ruling that on the outbreak of the war the German partners appropriated Richard Mayer's interest to themselves, so that they held no interest of his to protect.

11. In holding that Richard Mayer's claim for counsel fees and other disbursements incurred in the prosecution of the former suit of *Mayer* vs. *Garvan* should be

charged against the Alien Property Custodian's share of the assets in Mayer's hands on accounting.

12. In holding and ruling that the liability for reserves as shown on the balance sheet of the partnership on December 31, 1916, should not be allowed as a liability of the firm in a partnership accounting.

13. In failing to hold and rule that the European assets of the partnership have depreciated in value—as measured in currency of the United States—because of the depreciation in the value of Germany currency.

14. In failing to hold and rule that no fault or neglect on the part of individual partners caused the depreciation in the value of the European assets of the partnership since the declaration of war.

15. In holding and ruling that none of the depreciation in the value of the European assets of the partnership after dissolution is chargeable to Richard Mayer.

16. In holding and ruling that the Alien Property Custodian is chargeable with the value of Mayer's share in the European assets at the time of dissolution, without allowance for depreciation in the value of those assets thereafter.

17. In holding and ruling that the enemy share of American assets payable to the Alien Property Custodian on account is to be diminished because of the failure of the German partners to liquidate the European assets after the outbreak of war.

18. In holding and ruling that Richard Mayer was entitled to a credit on April 6th, 1917 on account of the German assets of the partnership.

19. In failing to hold and rule that Richard Mayer was not entitled to any credit on account of the German assets of the partnership until an account of all the affairs of the partnership could be had.

20. In failing to hold and rule that the equitable title to the partnership property remains unaffected by the outbreak of the war or by any act of the partners until final accounting and distribution.

* * * * * *

The German partners claim that the court erred (R. 159):

1. In holding and ruling that Richard Mayer's distributive share of the European assets of the partnership of Reis & Company ascertained in German marks should be translated into American dollars at the rate of $.2382.

2. In failing to hold and rule that the term "marks" as used by the German partners in the account of the partnership assets in Germany and as used by the witness Edwin Reis, in his testimony at the trial referred to the then current paper marks as distinguished from gold marks.

3. In holding and ruling that the marks in question in this case had any intrinsic value in gold at any time after the passage of the German legal tender acts.

4. In holding and ruling that the intrinsic value of the German marks in which the German assets of the partnership were measured was the amount of gold contained in .2382 of an American dollar.

5. In failing to hold and rule that the number of German marks payable to Richard Mayer as his distributive share in the European assets of the partnership must be translated into dollars at the rate of exchange current at the date when the accounting was stated in this proceeding.

6. In holding and ruling that Richard Mayer was entitled to a credit on April 6th, 1917 on account of the German assets of the partnership.

7. In failing to hold and rule that Richard Mayer was not entitled to any credit on account of the German assets of the partnership until an accounting of all the affairs of the partnership could be had.

8. In holding and ruling that the Alien Property Custodian is chargeable with the value of Mayer's share in the European assets at the time of dissolution, without allowance for depreciation in the value of those assets thereafter.

9. In holding and ruling that Richard Mayer should not share the losses occasioned by the depreciation in the value of the European assets of the partnership after dissolution.

10. In failing to hold and rule that the title to the partnership property remains unaffected by the outbreak of the war or by any act of the partners until final accounting and distribution.

11. In failing to hold and rule that the European assets of the partnership have depreciated in value—as measured in currency of the United States—because of the depreciation in the value of German currency.

12. In failing to hold and rule that no fault or neglect on the part of the individual partners caused the depreciation in the value of the European assets of the partnership since April 6th, 1917.

13. In holding and ruling that the German partners became liable for the value of Richard Mayer's share of the German assets at the time of dissolution on account of failure to liquidate.

14. In failing to hold and rule that no loss whatsoever was sustained in this case by failure to liquidate.

15. In holding and ruling that the German partners after April 6th, 1917 continued the German business of the partnership on their own account, treating the German assets as their own.

16. In failing to hold and rule that Richard Mayer continued the American business of the partnership after April 6th, 1917 as a going business.

17. In holding and ruling that Richard Mayer's distributive share in the European assets of Reis & Company is 2,364,056.12 marks, arrived at as follows: 2,097,223.72 marks found by the District Court as Richard Mayer's share; 226,432.40 marks paid by the German partners to the German Government as taxes levied against Mayer's share of the German assets, and disallowed as a credit in the account of the German partners by the Circuit Court of Appeals; 50,400 marks paid by the German partners to Mayer's relatives at his request, and also disallowed as a credit in the account of the German partners by the Circuit Court of Appeals.

18. In failing to hold and rule that Richard Mayer's distributive share in the European assets of Reis & Company as of April 6th, 1917, is 18,206,591.22 marks exclusive of profits since that date or interest or the sum of

27,000,000 marks inclusive of profits or 19,121,404.44 marks inclusive of interest.

19. In failing to hold and rule that the Alien Property Custodian was entitled to $661,584.26 as the German partners' share of the American assets of the firm of Reis & Co.

20. In holding and ruling that the sum of 956,814.31 marks set aside by the German partners for reserves should not be included among the liabilities to the payment of which Richard Mayer's share should contribute.

21. In holding and ruling that Richard Mayer is entitled to charge against the firm assets in his hands the sum of $4,000.00 paid out by him as a premium on a surety bond.

22. In holding and ruling that Richard Mayer was not chargeable on a partnership accounting for the sum of 266,432.40 marks paid by the German partners as taxes upon Mayer's interest in the partnership property in Germany assessed during the years 1914, 1915 and 1916.

23. In holding and ruling that Richard Mayer was not chargeable with the sum of 50,400 marks paid by the direction of Mayer to his relatives in Germany.

24. In holding and ruling that Richard Mayer's claim for counsel fees and other didsbursements incurred in the prosecution of the former suit of *Mayer* v. *Garvan* should be charged against the Alien Property Custodian's share of the assets of Mayer's hands.

25. In failing to hold and rule that the claims of the employees Ely, Leiser, Sanft and Heinstein for percentages of profits of the firm constitute liabilities of the co-partners, and in failing to make provision in the decree of the payment of these liabilities.

(Richard Mayer) should have been allowed interest or other compensation for loss of use of the property taken without right by the Alien Property Custodian in 1918 claiming it as the property of Mayer's German former partners and until its return in 1922.

Argument.

With respect to the assignments of error filed on behalf of the German partners, and ignoring such apparent repetitions thereon as may have been dictated by technical considerations, it is submitted as follows:

FIRST: The Court erred in deciding that any sum in marks *was due* Richard Mayer as of April 6, 1917. The assets and liabilities of the partnership must be ascertained as of that date, solely for the purpose of limiting Richard Mayer's liability in a continuing business, but not to effect *distribution* or *division* of the partnership assets as of that date. No accounting and determination of the distributive shares of the partners could be had until the trial.

SECOND: The account of the German partners shows that they have accounted for everything they received in the currency in which they received it. The loss which has been sustained by the partnership arises exclusively from the depreciation of that currency.

THIRD: The Court erred in translating Mayer's distribution share, computed in marks, into dollars at the par of exchange ($.2382) for the purpose of rendering a decree in dollars, and in failing to employ the commercial rate of exchange current at the time of the accounting, *i. e.* on the trial.

FOURTH: The Court erred in holding and ruling that the sum of marks 956,814.31 set aside by the German defendants for reserves should not be included among the liabilities, to the payment of which the defendant Richard Mayer's share should contribute. 500,000 marks of said reserves constituted a partnership liability.

FIFTH: The Court erred in failing to hold and rule, that the claims of Ely, Leiser, Sanft and Heinstein for percent-

ages of profits of the firm constitute a liability of the firm and in failing to make provision in the decree for the payment of these liabilities.

SIXTH: The Court below erred in disallowing the sum of 266,432.40 marks paid by the German partners for taxes and the sum of 50,400 marks paid by the German partners to Mayer's relatives at his request.

SEVENTH: The Court erred in ruling that defendant Richard Mayer is accountable for the sum of only $828,072.72.

EIGHTH: The Court erred in allowing Mayer's claim for premium in connection with the bond he furnished to the Alien Property Custodian and in allowing counsel fees.

NINTH: The correct computation of Richard Mayer's distributive share of all the assets.

FIRST.

The Court erred in deciding that any sum in marks *was due* Richard Mayer as of April 6, 1917. The assets and liabilities of the partnership must be ascertained as of that date solely for the purpose of limiting Richard Mayer's liability in a continuing business, but not to effect distribution or division of the partnership assets as of that date. No accounting and determination of the distributive shares of the partners could be had until the trial.

The two principal errors complained of on this appeal by the German partners are that, for the purpose of a partnership division or distribution the Court ascertained Richard Mayer's distributive share in the German assets as

of April 6, 1917, and not as of the date of trial, March, 1923, and converted the same into dollars at the par of exchange.

This accounting formula was adopted under the mistaken belief that the occurrence of war, operating as a dissolution of the partnership, automatically established, as of April 6, 1917, a debit and credit relation between the partners and fixed Richard Mayer's distributive share as of April 6, 1917 (whenever ascertained) as a debt due, *eo instanti*, to him by the German partners. No importance was attached by the Court to the fact that no partnership accounting was possible until 1923, and the decree in *Mayer* vs. *Garvan* had so found (R. 150).

The District Court and Circuit Court of Appeals proceeded on the theory that, upon dissolution, Richard Mayer became a creditor of the partnership.

That the District Court regarded Mayer's distributive share as of April 6, 1917, as a debt appears from the following parts of its opinion (R. 72, 73).

> "There are, however, respectable authorities in the United States which hold that in an action for money due and payable in a foreign country, the rate of exchange should not be taken into consideration in computing the sum due in American money; but that the par of exchange should govern."
>
> *Adams* v. *Cordis*, 8 Pick. 260;
> *Alcock* v. *Hopkins*, 6 Cush. 484;
> *Lodge* v. *Spooner*, 8 Gray 166;
> *Commonwealth* v. *Haupt*, 10 Allen 38;
> *Burgess* v. *Alliance Ins. Co.*, 10 Allen 221;
> *Swanson* v. *Cooke*, 45 Barb. 387 (574);
> *Rice* v. *Ontario S. B. Co.*, 56 Barb. 387;
> *Martin* v. *Franklin*, 4 Johns. 124;
> *Skofield* v. *Day*, 20 Johns. 102;
> *Hussey* v. *Farlow*, 9 Allen 263;
> *Reiser* v. *Parker*, 1 Lowell 262.

"Translating the distributive share of Richard Mayer into European assets, M 2,097,223.72 into dollars at .2382 to the mark would make $499,558.69" (R. pp. 92, 93),

and also (R. 71):

"It was held in *Brown* v. *Hiatts*, 15 Wall. 177, that interest did not run during the war on a debt owing to an enemy, quoting with approval the decision of the Supreme Court of Pennsylvania in *Hoare* v. *Allen*, 2 Dallas 102."

and also (R. 74):

"Not only because the distributive share of Mayer had not been determined, but because, after the outbreak of the war payment to him would have been illegal, I find the German partners are not liable for payment of interest on Mayer's distributive share."

and also (R. 72):

"I find that the German partners should account as of April 6th, 1917, for Mayer's share at M. 2,097,223.72."

The opinion of the Circuit Court of Appeals does not indicate any quarrel with the District Court's theory, but rather an approval of the same. In the opinion Judge Hale said (R. 152):

"We have no doubt that the accounting in this case must be as of the date of dissolution and termination of the partnership, April 6, 1917, on and after which time the German partners conducted the business in Germany on their own account, treating the assets there located as their own."

Thus it appears that the Trial Court and the Circuit Court of Appeals, having found some authority for the employment of the par of exchange in converting into dollars a *debt payable* in a foreign country and sued on here, proceeded to employ that method of conversion in the instant case. In holding that the German partners must account

as of April 6, 1917, for Mayer's share, the Court does not merely set a limit beyond which Mayer's liability in a continuing business may not be further extended, but it definitely fixes the amount which became due to Richard Mayer as of that date, regardless of inventory or other depreciation or subsequent losses not attributable to the fault of individual partners. In so doing the court was undoubtedly influenced by the argument strenuously urged by counsel for defendant Mayer, who, both in the oral argument before the court and in his brief, contended that Mayer's distributive share was a debt due him on April 6, 1917. To sustain this proposition, counsel for Richard Mayer relied on an unhappy wording of the decree in the case of *Mayer* v. *Garvan*. In that case the decree contained the finding:

> "That the complainant on the dissolution of the partnership with the outbreak of war, had a lien on the American assets and their proceeds for what was due him from the partnership on an accounting of the affairs of the partnership, and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting."

Counsel for defendant Richard Mayer seized upon the words "what was due him from the partnership", and contended that by the use of the words "was due him", the Court could have only meant that something was due him on April 6th, 1917. This view was apparently also taken by the Trial Court, notwithstanding the fact that the learned trial Justice himself had written the opinion in the Circuit Court of Appeals, 278 Fed. 27, in which he substituted for the words "what was due him", the words "which might be due him after liquidation"—the relevant language of the opinion being as follows:

> "Whether title to the American assets after the declaration of war was in the partnership as a legal entity or in the former partners as joint owners in proportion to the shares to which each might be entitled after liquidation, complainant had an equitable lien upon all the American assets to secure the distributive

> share which might be due him after liquidation and also to secure the payment of partnership debts.
>
> Under the partnership articles the complainant is entitled upon distribution to have repaid him out of the assets of the partnership, the amount of his capital investment with interest and also 20% of the net profits which had been earned by the partnership, and he is liable for 20% of all losses."

Of course the argument by Mayer's counsel rests wholly upon the strained interpretation of a single word, and is contrary both to the fair interpretation of the entire finding and the well settled principles of partnership law. The words "what was due him from the partnership" must be read in conjunction with the words that follow, namely, "on an accounting of the affairs of the partnership." The use of the phrase was unhappy in view of the error it has occasioned.

The court's opinion in the former suit did not intend to say, we are sure, that anything was actually due Mayer on April 6, 1917, in view of the fact that the court expressly found that, on the state of the evidence then existing, it was unable to state an accounting, and that Mayer's lien was only for what was due him from the partnership on an accounting. This appears more fully from a consideration of the following language in Judge Bingham's opinion (*Mayer* v. *Garvan*, 270 Fed. 229):

> "The liabilities of the firm so far as the evidence discloses cannot be ascertained and the value of the German mark on the date of the dissolution of the firm, *or any subsequent date as of which an accounting should be stated* has not been presented." (Italics ours.)

Counsel for Richard Mayer also relies upon the following language used by the court in *Clay* v. *Field*, 138 U. S. 464, 473, as giving Richard Mayer the right to elect whether or not to become a creditor of the partnership at the time of the dissolution:

> "The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the

partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due to them; and if he takes the responsibility of continuing the business of the firm, and using the property of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the profits which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm. (See Lindley on Part. Book III, Chapter 10, pages 976 to 1046, 1047, 4th Ed.) The application of the rule in this case would, strictly speaking, entitle the representatives of D. I. Field (the deceased partner) to call for an account of his share in the capital of the concern *at the time of his death*, with lawful interest". (Italics not in original.)

The foregoing language used by the court has reference to an outgoing partner's right of election between profits and interest as compensation for the use of his capital in a continuing business after the dissolution. It is not authority for the proposition that Richard Mayer became a creditor of the partnership on April 6, 1917.

Dissolution does not create a debtor and creditor relationship among the partners.

It is well established law that the dissolution of a partnership does not effect a change of relationship from that of co-partners to that of debtors and creditors. Mr. Justice Story in his famous work on Partnership (7th edition), § 221, says that

"until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount. Now the settlement of all the partnership concerns is ordinarily, during the continuance of the part-

> nership, unattainable at law; and even in equity it is not ordinarily enforced, except upon a dissolution of the partnership".

The act of dissolution, while terminating the partnership for certain purposes, is for other purposes, merely the initial step in a program which contemplates as its ultimate object the determination and payment to each partner of his share in the net assets of the firm. We quote again from Mr. Justice Story (§ 325), who says:

> "On the other hand, notwithstanding the dissolution of the partnership, there still remain certain rights, duties, powers, authorities, and relations between them which the law recognizes and supports, because they are, or may be, indispensable to the complete arrangement and final settlement of the affairs of the partnership; and, therefore, in a qualified and limited sense, the partnership may be said for those purposes to continue between the parties until such arrangement and settlement take place. Indeed, as has been well said by a learned author on this subject, from the very nature of the partnership, engagements may be contracted which cannot be fulfilled during its existence, exposed as it is to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means, and assets of the partner, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest must subsist, although, for all other purposes, the partnership is actually determined."

Substantially the same language was used by Lord Elden in *Crawshay* v. *Collins,* 15 Ves. 226.

See also:

> Story on Partnership, §§ 326-328; 344.
> 30 Cyc. 659 *et seq.*
> *Freeman* v. *Freeman,* 136 Mass. 260, 263, 264.

In Parsons on Partnership (4th Edition), § 286, p. 376, it is said:

> "In the first place, a mere dissolution has no effect whatever on the property of the partners, or their interest in the joint stock or joint rights, or their power over old or existing debts due to them or due from them; excepting always that they have all entirely lost the power of acting for each other, or binding each other, any further than all joint debtors or joint creditors may do."

Judge Story in discussing advances made by partners to the firm emphasizes the distinction between moneys advanced for account of co-partners and the ordinary relationship of debtor and creditor. He says at § 348-*a*:

> "If any partner has made advances to the firm, and others have received advances from it, these *do not constitute debts strictly speaking until the concern is wound up but only are items in the account* between the partners." (Italics ours.)

And he cites the case of *Richardson* v. *Bank of England*, 4 Myl. & C. 165, 172. On this occasion Lord Cottenham said, speaking of debtor and creditor partners:

> "But though these terms 'creditor' and 'debtor' are so used and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no process either at law or in equity, assuming always that no separate security has been taken or given. The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners. Indeed, it could not do so with effect, inasmuch as immediately after a decree has enforced payment of the money supposed to be due,

> the party paying might in exercise of his power of a partner, repossess himself of the same sum. But if, pending the partnership, neither law or equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of account and before the payment of the joint debts or the realization of the partnership estate? Nothing is more settled than that under such circumstances what may have been advanced by one partner or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust that which he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither party has any remedy against or liability to, the other for payment from one to the other of what may have been advanced or received."

See also *Arnold* v. *Arnold*, 90 N. Y. 580, 583, the leading case in the State of New York.

As Lord Cottenham indicated in *Richardson* v. *Bank of England, supra*, the use of the expression "debtor" and creditors" in defining the relationship of partners to each other is inaccurate and erroneous. Its occasional or possibly usual use in trade circles and for want of a more accurate lay expression is explained by Lindley (Partnership, p. 432) as follows:

> "It is usual among mercantile men to treat all the accounts of a partnership as accounts of the firm and to deal with the accounts of individual partners as if they were simply debtors or creditors of the firm."

And he says that this is done for bookkeeping purposes only,

> "Each partner being thus treated as an ordinary creditor and debtor in respect of what he brings in and what he draws out. The balance standing to his credit or to his debit, as the case may be, in the private ledger, shows how his account with the firm stands. Upon payment of that balance by the firm to him, if the bal-

ance is in his favor, or by him to the firm if the balance is against him, his account with the firm is closed and settled."

Lindley distinctly points out (p. 436):

"but it must not be imagined that the balances in question are debts owing to each partner by his co-partners."

It is said that

"The reason why one partner cannot sue another at law is that nothing is due from one to the other on account of the partnership transactions until the final settlement of the partnership accounts which can be compelled only in chancery."

Pote v. *Phillips,* Fed. Cas. No. 11316.

See also:

Lamalere v. *Caze,* Fed. Cas. No. 8003;
Goldsboro v. *McWilliams,* Fed. Cas. No. 5518;
Gommersall v. *Gommersall,* 96 Mass. 60;
The Emmaus, 51 L. J. 7 (Adm. Ct.) *29 Harvard Law Review* 795.

An actual settlement must be made and a balance struck by the act of all partners before any of them can be sued in an action of assumpsit. It is not sufficient that the balance may be adduced from the partnership books.

Anderson v. *Allen,* 9 S. & R. 241.

A debt has been defined as a sum of money due by certain and express agreement where the amount is fixed and specific and does not depend on any future valuation to settle it.

Milliken v. *Slote,* 1 Nev. 585, 590; quoting Bouvier's definition.

Powell v. *Railway Company,* 36 Fed. 726, 730, quoting 3 Blackstone Com. 154.

In *Martin* v. *Hobson,* L. R. 8 Ch. 401, it was held that the phrase "money due" did not include an unascertained share in certain partnership assets.

See also

20 Amer. and Eng. Encycl. 841.

No principle of partnership law is better settled than that interest does not run on a partner's distributive share until after a balance is struck on an accounting, and the Court below recognized that principle in disallowing Richard Mayer's claim for interest. In stating the reason for disallowing his claim for interest, however, the District Court coupled the statement that the German partners could not determine the distributive share of Mayer in the firm assets with the further statement that, if they had been able to do so, they could not *pay* any part of his share to him while a state of war continued, the Court saying (R. 74):

> "Interest upon the partner's distributive share cannot be allowed until it has been determined. Not only because the distributive share of Mayer had not been determined, but because, after the outbreak of the war payment to him would have been illegal, I find the German partners are not liable for payment of interest on Mayer's distributive share."

The act of dissolution does not operate as a distribution or allocation of partnership assets. Some agent or agency—normally the surviving partners themselves or one designated by them as liquidating partner—must administer the assets and liabilities.

Moore v. *Huntington*, 17 Wall. 417, 423.

And until this is done and an accounting had between the partners and a balance struck on that accounting the partnership property remains partnership property and may not become the individual property of any of the partners merely by conversion.

Story on Partnership, § 351;
Cramer v. *United States*, 7 Ct. Cl. 302;
Grant v. *Fletcher*, 283 Fed. 243, 259;
Zimmerman v. *Harding*, 227 U. S. 489, 494.

During such period of administration the partnership entity—the estate in process of administration—may be committed to the tender mercies of a court of bankruptcy.

In re Coe, 157 Fed. 308;
In re Stein & Co., 127 Fed. 547, 549

The assets and liabilities of the partnership must be ascertained as of April 6, 1917, solely for the purpose of limiting Richard Mayer's liability in a continuing business, but not to effect distribution or division of the partnership assets as of that date.

If the administration of the estate of the dissolved partnership must precede the determination of the balance due each partner, what then, it may be asked, is the significance of the phrase frequently used in reference to partnership accounting, that the accounting must be stated as of the date of dissolution?

By the phrase "stating the account as of the date of dissolution" no more is meant than that the assets and liabilities of the firm must be determined and identified as of that date, so that no partner's share may be jeopardized by subsequent transactions not connected with the winding up of the partnership business. In other words the assets and liabilities should be inventoried as of the date of dissolution, so that if there be any subsequent shrinkage of assets the responsibility for such loss may be fixed, and if such loss occur through the unauthorized and unlawful act of an individual partner, the partner so responsible may be charged with such loss upon final accounting and distribution.

In *Moore* v. *Huntington*, 17 Wall. 417, it is said:

> "It was the legal right of defendants, as surviving partners, to close out the concern, collect and dispose of its choses in action, and its property, pay what it owed, and then pay over to the plaintiff her just share of what was left. They were not bound to become purchasers of

> the defendant's interest at a valuation. But they were bound to use reasonable diligence and care in closing out the business, and in taking care of the decedent's interest. If they used such care and diligence they were only liable for what was realized in their hands when it was done. If they did not they are liable for what might have been realized by the use of such care and diligence."

To hold that the German partners must account to Richard Mayer "as of April 6, 1917, for Mayer's share at M. 2,097,223.72", in the sense that the mark amount which in this accounting may be ascertained as the distributive share which would have accrued in Richard Mayer's favor on April 6, 1917, *had an accounting taken place on that date*, without taking into consideration subsequent losses not due to the fault of the German partners, is to endow Richard Mayer's right to a share on partnership distribution with the qualities that inhere in a debt as though the debt had accrued in his favor at the time of dissolution.

In the case at bar it is undisputed that no loss or diminution of the German assets has resulted from the carrying on of the business by the German partners, nor were the liabilities increased thereby. Accordingly the trial Court found in its opinion (R. 69):

> "and whether the German partners held Mayer's share of the European assets as trustees or liquidating partners or whether they went on with the business as a going concern in Germany, using his share of the assets and expecting to account to him at the close of the war as a partner, is immaterial."

There is no liability for failure to liquidate where there is no loss. And where the loss is not attributable to the fault or neglect of the partners who fail to liquidate but continue the business after dissolution the loss must be borne by all the partners alike.

Clay v. *Field*, 138 U. S. 464, 473.

The failure of the Geerman partners to liquidate resulted in no loss; in fact there was an enormous appreciation prior

to the accounting in the value of the German assets, measured in the currency of the country in which those assets were located. The stating of an account as of April 6, 1917, therefore, results in the establishment of no liability upon the German partners for losses subsequent thereto.

Dissolution of the partnership by war does not invest partners with the rights of creditors. The partnership property continues to remain the property of all the partners, though the interest or equity of the alien partners, determined upon an accounting, may be seized by the local government or vested in some public officer thereof, such as the Alien Property Custodian. Though intercourse between the enemy partners be prohibited on the outbreak of the war and the partnership dissolved, the effect is no greater than that which occurs where a partnership is dissolved by mutual agreement of the partners.

See:

Buchanan v. *Curry*, 19 Johns. (N. Y.) 137;
Douglas v. *United States*, 14 Ct. Cl. 1;
Cramer v. *United States*, 7 Ct. Cl. 302, 304;
Stevenson & Sons, Ltd. v. *Aktiengesellschaft, etc.*, (1918) A. C. 239;
Clay v. *Field*, 138 U. S. 464;
30 *Cyc.* 655.

In the language of Chancellor Kent, in the leading case of *Griswold* v. *Waddington*, 16 Johns. 438:

> "the parties were still partners as to those goods which had been actually purchased by them before the war; and the parties, as partners, were bound to account to each other for the proceeds of these goods, and equally bound as partners to pay for them, if not already paid for. A dissolution of partnership only has respect to the future. The parties remain bound for all antecedent engagements. The partnership may be said to continue as to everything that is past and until all pre-existing matters are wound up and settled."

This doctrine is analogous to that which permits a resident agent in enemy territory to collect though not to remit assets.

U. S. v. *Grossmayer*, 9 Wall. 72;
Insurance Company v. *Davis*, 95 U. S. 425.

At the outbreak of the war on April 6, 1917, the assets of the partnership of Reis & Co. consisted of real property in Germany and merchandise, securities, accounts and bills receivable, etc., in the United States and Germany; the American assets having a value in excess of $900,000 (R. 31) and the German assets a value in excess of marks 15,000,000 (R. 85). The net worth of the partnership was not, of course, represented by these figures, nor did these figures represent the amount to become available for distribution among the partners. There were partnership liabilities to be met; the assets were subject to diminution or loss in the liquidation thereof. Depreciation in securities, inventory depreciation, credit losses, fire and other casualties are normal experiences in the life of going concerns and these misfortunes are not unknown in the administration of estates.

No accounting and determination of the distributive shares of the partners could be had until the trial.

Upon the outbreak of the war all intercourse between Mayer and the German partners became illegal, both at common law and under Section two of the Trading with the Enemy Act and no accounting could be had or attempted until after the termination of the war on July 2, 1921.

United States v. *Grossmayer*, 9 Wall. 72;
Act of Cong., October 6, 1917, c. 106, 40 Stat. 411.

After the termination of the war Richard Mayer was engaged in pressing a claim against the Alien Property Custodian and in asserting ownership of the American assets under

an alleged dissolution agreement determined by the court in *Mayer* v. *Garran*, 278 Fed. 27, to be invalid, and he was in no mood for an accounting, and it was not until May, 1922, following that decision, that he made any and then only an abortive attempt to account.

His "*nulla bona*" return was rejected by the Alien Property Custodian and became the occasion for the present suit for an accounting, to which the German partners were made parties defendant. On the trial thereof, in March, 1923, for the first time was there presented evidence by the parties to support an accounting and a determination of the surplus of the partnership available for distribution to the respective partners.

SECOND.

The account of the German partners shows that they have accounted for everything they received in the currency in which they received it. The loss which has been sustained by the partnership arises exclusively from the depreciation of that currency.

On December 31, 1916, all the German assets had a value of marks 15,282,170.55, exclusive of liabilities which amounted to approximately marks 4,000,000 (R. 85). The value of all the German assets on April 6, 1917, is not stated inasmuch as no inventory was taken on that day, but the uncontradicted testimony (R. 85) shows, that the book values of the assets were practically the same on April 6, 1917, as on December 31, 1916, so that we may consider the assets on hand as of December 31, 1916, and see how they are treated in the account of the German partners.

Edwin Reis testified that, in addition to the merchandise, the accounts receivable, the investments and notes receivable

were quick assets which were liquidated within the year 1917 (R. 85). The cash on hand was marks 5,811.29.

The German partners charged themselves with the full amount of the assets on hand December 31, 1916, towit: Marks 15,282,170.55. If they had undertaken the technical process of liquidation, and if, without any fault on their part, merchandise on hand say at Friedrichsfeld which amounted to marks 1,371,553.63 (R. 49) had been destroyed by fire, the German partners would not be responsible for that loss and would be entitled to credit themselves with the loss, leaving the net assets chargeable to them at marks 13,910,616.92. If they did not go through the technical process of liquidation, but continued to use the assets in a going business, applying the rule that the failure to liquidate makes partners so failing to liquidate chargeable with the value of the assets at the time of dissolution and renders them liable to bear the entire burden of the subsequent loss of the assets, the German partners would have to bear the entire loss occasioned by a fire without any proportionate burden being placed on Richard Mayer. In other words, Mayer would still be entitled to his 20% of marks 15,282,170.55, for which the German partners have to account, less his proportionate share of the liabilities, although they might have had, as a result of the fire, only marks 13,910,616.92 in their possession. And this would be just.

There has been, however, no loss as a result of the failure to liquidate assets, and the record does not indicate that any profits were made in excess of those already credited to Richard Mayer on this accounting. The partnership books and the testimony conclusively prove that the marks 15,282,-170.55 of assets were all converted into cash by the German partners with the exception of the Friedrichsfeld plant which was unsold at the time of trial. The merchandise on hand was sold for its full value. The cash on hand was, of course, retained as cash and accounts receivable were collected in full, and the Herzberg and Franzenthal plants, which, together with the Friedrichsfeld plant, constituted all the

fixed assets of the firm, were sold for their full value. The Friedrichsfeld plant alone remained unsold. All the partners have agreed on the value with which the German partners are to charge themselves on this accounting for the Friedrichsfeld plant. Thus the German partners, in the normal course of business, and by reason of the sale of the Herzberg and Franzenthal plants, at favorable prices, received for all the German assets exclusive of the Friedrichsfeld plant, the sum of marks 16,133,678.89, although the value of these assets as charged to them at dissolution was only marks 14,994,678.89, the increase of marks 1,139,000 being due to the sale of the Herzberg and Franzenthal plants at figures far in excess of their book values, which again is accounted for by the constantly diminishing purchase power of the mark. In addition to that sum realized from the sale of all the assets except the Friedrichsfeld plant, there should be added the sum of approximately marks 81,000,000, the value of the Friedrichsfeld plant on March 27, 1923 (see Defendant's Exhibit XIII, R. 146), which is conceded by Richard Mayer as the correct value of the Friedrichsfeld plant, if that in any way becomes material on this accounting. The difference between marks 81,000,000 and marks 287,491.66, the value of the Friedrichsfeld plant at the time of dissolution, is also accounted for by the depreciation of the mark. Thus the German partners must be held accountable for all the German assets at marks 97,133,678.89. This sum does not include profits that were made by the use of that capital after dissolution.

Edwin Reis testified that Richard Mayer's share, including such profits as of the date of trial would amount to marks 27,000,000 (R. 84).

It is obvious that if all the German assets of the partnership had been liquidated immediately upon the outbreak of the war, the partnership assets would have been converted from merchandise, accounts receivable, etc., into marks or mark credit balances with some banking institution, and the German partners would have realized (substituting actual

value as of April 6, 1917, for the book value of the Friedrichsfeld plant) marks 15,729,706.89; which marks or mark credit balances would have been held by the partnership until the final accounting with little augmentation in amount, except by such interest credits thereto as might have been obtained from banking depositaries. On the final accounting, therefore, the German assets would have only approximated the amount which was actually realized from the sale of all other assets except the Friedrichsfeld plant, namely marks 16,133,678.89. In other words the failure to dispose of the Friedrichsfeld plant in 1917 has resulted in the German assets on the accounting having a value in marks of five or six times the value which the partnership assets would have had if all assets had been liquidated at the time of dissolution Richard Mayer has therefore obtained a substantial benefit through the failure of the German partners to liquidate all the assets.

The German partners are obviously not responsible for the depreciation of the German mark, nor for the fact that the German assets upon liquidation and upon an accounting must be converted into or valued in marks.

That the marks have depreciated in purchasing power and in their relation to the United States dollar, cannot, of course, be denied. It is an historical fact, of which Judge Johnson took notice (R. 70) that after the outbreak of the world war in 1914, Germany issued huge volumes of fiat money in the form of paper marks, and so long as the credit of the government was good these paper marks were accepted everywhere in Germany at their full nominal value. As a matter of fact there was no choice of accepting them or rejecting them in preference to gold marks or metallic marks, for an act was passed on the 4th day of August, 1914, making paper marks legal tender. This has been testified to by Edwin Reis, and a copy of the act has been introduced in evidence as Plaintiff's Exhibit 2 (R. 86, 97, 98).

As the war progressed, increasing large quantities of these paper marks were printed and put in circulation by the Ger-

man government. Contemporaneous with the passage of the Legal Tender Act, a law was enacted which provided that paper marks need not be redeemed by the Imperial Treasury or by the Reichsbank (R. 97, 98). The paper marks then went the course of all fiat money unsupported by gold reserve. Their purchasing power constantly diminished, while their position in the commerce of the nation became paramount.

Unfortunately the assets of the German partnership could not be exported and their conversion and valuation could only be had in depreciated paper marks. The German partners committed no breach of trust or duty in accepting paper marks. They were bound to do so. The debtors of the partnership were permitted to pay the obligations to the partnership in such depreciated currency and the partnership was bound to accept it.

In this country it has been held that upon an accounting an executor cannot be surcharged for having accepted depreciated greenbacks at their nominal value in payment of debts owing to the estate, where he was bound to accept the same under the Legal Tender Acts.

Jackson v. *Chase*, 98 Mass. 286.

Similarly in the case of *McNair* v. *Ragland*, 16 N. C. (1 Dev. Eq.) 520 it was held that a partner collecting in depreciated continental currency debts due the firm, was obliged to account only for the currency he actually received.

Money is, in the last analysis, merely a commodity, and the value of various currencies is subject to the operation of economic laws.

The experience of European nations since the outbreak of the world war and the experience in this country in the past indicates how unstable currencies may be or become, and we have yet to find a case which holds that partnership losses due to depreciation in currency may be saddled upon the liquidating partners or upon those partners who are so unfortunate as to reside in the country whose currency is debased or depreciated.

THIRD.

The Court erred in translating Mayer's distributive share computed in marks into dollars at the par of exchange ($.2382) for the purpose of rendering a decree in dollars.

Despite the fact that the uncontradicted evidence in this case showed that the German partners had received paper marks for the sale of the German assets and that the value of the only remaining unsold asset, to wit: the Friedrichsfeld plant, had been testified to, at the trial, in paper marks, the trial court proceeded to convert the same into dollars by the use of the par of exchange as a medium of comparison. He states in his opinion (R. 70):

> "It is a matter of general knowledge that, as a result of the outcome of the war and economic conditions existing in Germany and the issue of huge volume of paper marks which do not rest upon any gold standard, there has been a tremendous shrinkage in the value of the German mark as expressed in the United States monetary unit of value. Upon March 30, 1917, the nearest date to April 6, 1917, when the rate of exchange was quoted, the value of the German mark in the currency of the United States was about 18 cents. After the declaration of war there was of course no rate of exchange between the United States and Germany and none was quoted until some time in 1919, when the first quotation of the value of the German mark in the currency of the United States was 7⅞ cents. Upon July 2, 1921, when the state of war was declared to be at an end by the Act of Congress, the German mark had declined to 1.35 cents; and at the time of the beginning of the hearing before me, March 28, 1923, its value was .0048 of a cent, and it is well known that since that time the rate of exchange has further declined. There is no evidence to show the domestic value of the German mark nor whether the decline in the rate of exchange, as shown in this country, correctly expresses the decline in its value in Germany."

Notwithstanding the depreciation of the mark and its small value in dollars, the District Court resorted to the par of exchange in effecting conversion of marks into dollars. It said (R. 72, 73):

> "The decree in this case must be in terms of American dollars. The American assets are measured in terms of the American gold dollar containing gold of a standard weight and fineness. The German assets should be measured by the same yard stick; that is, by the gold mark, which is equivalent to .2382 of a cent of the money of the United States, both based upon a gold standard.
>
> Counsel have cited in argument cases to show that the rate of exchange between two countries at the time of the breach of the contract is the rule adopted in English courts when judgment is to be rendered there for a debt payable in another country; and have also cited American authorities which hold that the rate of exchange at the time of the trial or of the judgment should govern. There are, however, respectable authorities in the United States which hold that in an action for money due and payable in a foreign country, the rate of exchange should not be taken into consideration in computing the sum due in American money; but that the par of exchange should govern.
>
> *Adams* v. *Cordis*, 8 Pick. 260;
> *Alcock* v. *Hopkins*, 6 Cush. 484;
> *Lodge* v. *Spooner*, 8 Gray 166;
> *Commonwealth* v. *Haupt*, 10 Allen 38;
> *Burgess* v. *Alliance Ins. Co.*, 10 Allen 221;
> *Swanson* v. *Cooke*, 45 Bar. 387;
> *Rice* v. *Ontario S. B. Co.*, 56 Barb. 387;
> *Martin* v. *Franklin*, 4 Johns. 124;
> *Skofield* v. *Day*, 20 Johns. 102;
> *Hussey* v. *Farlow*, 9 Allen 263;
> *Reiser* v. *Parker*, 1 Lowell 262.
>
> Translating the distributive share of Richard Mayer into European assets, M 2,097,223.72 into dollars at .2382 to the mark would make $499,558.69."

This action of the District Court in using the theoretical par of exchange was approved by the Circuit Court of Appeals (R. 152, 153).

We have previously shown that upon the proclamation in German, immediately after the outbreak of the World War, of Legal Tender Acts, the inevitable result followed that gold was entirely withdrawn from circulation in Germany, a common occurrence observed in connection with paper currency made compulsory by Legal Tender Acts and generally referred to in text books on economics as Gresham's Law, in the light of which the testimony of Edwin Reis that, since August 1914, there have been no gold marks in circulation required no further corroboration.

The court by judicial decree has in effect confiscated the German partners' share in the American assets, which, under the terms of the partnership agreement, amounted to 80% of the total net profits, by giving Richard Mayer's share in the German assets a fictitious value not supported by any evidence and deducting that fictitious value from the American assets in his possession.

"Par of exchange" has been defined as an amount stated in one currency which is an equivalent for the same value expressed in another; it is a literal translation of the language of value in one country or currency into that of equal value in another. The true par of exchange between two countries is the equivalent of a certain amount of the currency of one in the currency of the other, supposing the currency of both to be at the precise weight and purity fixed by their respective mints; or in other words, it is the amount which the standard coin of either country would produce, when coined at the mint of the other.

Sutherland on Damages, 4th Ed., Sec. 212.

The par of exchange is an ideal, and whenever a currency becomes depreciated by either the issuance of debased metallic coinage or paper money not representing gold or silver in the treasury, the nominal or ideal par of exchange ceases to represent the true relation between the currencies. In order to find equivalents, we must then resort to the *real par*.

See

Hargrave v. *Creighton*, 1 Woods, 489, Fed. Cas. No. 6064;

Robinson v. *Hall*, 28 How. Prac. (N. Y.) 342;

U. S. v. *American Gold Coin*, 24 Fed. Cas. 780 (No. 14439).

Both of the last-mentioned cases involved depreciated greenbacks.

In *Thorington* v. *Smith*, 8 Wall. 1, the court characterizes as hardly less than absurd a statement that Confederate notes must be regarded as identical in kind and value as the dollars which constitute the money of the United States.

The decisions cited by the District and Circuit Court of Appeals to the effect that the nominal par should be used in converting marks into dollars involved debt claims and are predicated upon the decisions in the cases of *Martin* v. *Franklin*, 4 Johns, 124, and *Adams* v. *Cordis*, 8 Pick. 260. The rule adopted in these cases as regards the application of the par of exchange is by no means uniform (see Story, Conflict of Laws, 8th Ed., p. 426 *et seq.*) and the reasoning also which led to the adoption of that rule in the several states in which it has been adopted has been often criticized. The rule certainly has no application to the case at bar.

It is interesting to note that the decisions relied upon by the District Court and the Circuit Court of Appeals in translating marks into dollars at a theoretical par of exchange are of ancient vintage, and generally involve situations where the United States dollar was at a discount or the English pound at a premium in the exchange market, and off the record the decisions may be attributed to a certain provincial desire to announce or maintain the principle that our United States money was as good as any other money. In the green back cases and following the Legal Tender Acts, this court recognized that there may exist depreciation of currency, even that of the United States.

The world war has probably called to the attention of the public generally, as emphatically as possible, the prin-

ciples of Gresham's law, and has developed a number of decisions as to the rule to be applied in translating foreign currency into United States dollars.

See

Hoppe v. *Russo-Asiatic Bank*, 235 N. Y. 37;
Simonoff v. *Bank*, 279 Ill. 248;
Katcher v. *American Express Co.*, 94 N. J. L. 165;
S. S. "Celia" v. *S. S. "Volturno"* (1921) L. R. 2 App. Cas. 544;
Di Ferdinando v. *Simon Schmidts & Co.* (1920), 3 K. B. D. 409.

In a recent decision of this court, in *Guinness et al.* v. *Hicks*, Nos. 80 and 81, October Term, 1925, this court held that where an obligation payable in foreign currency had matured or existed prior to the outbreak of the war, the amount to be paid in dollars was to be calculated at the rate of exchange existing at the time of the breach of the obligation or on the date when the money became due, and it is interesting to note in the opinion that the value of the mark in dollars in December, 1916, was approximately 17½ cents.

The decision in the *Guinness* case clearly indicates that where there is evidence of the exchange value of the German mark, the court is not warranted in applying the par of exchange, and therefore the doctrine of *Birge Forbes Company* v. *Heye*, 251 U. S. 317,321 (where this court held that the lower court was warranted in taking the value of the German mark at par in the *absence* of evidence that it had depreciated at the time of plaintiff's payments), does not apply. Wherever the court has before it evidence as to the proper rate of exchange it has applied that rate, whether the conversion be of marks

Miller v. *Humphrey*, 7 Fed (2nd) 330

or francs

The Hurona, 268 Fed. 910;
Page v. *Levenson*, 281 Fed. 555;
Dante v. *Minnigio*, 298 Fed. 845

or florins

Wichita Mill, etc., v. *Naamlooze, etc.*, 3 Fed. (2nd) 931

or pounds sterling.

The Verdi, 268 Fed. 908.

That the nominal par of exchange may not always express the true or real par of exchange is recognized even in connection with the valuation of foreign currencies for custom house purposes, although a definite par of exchange for the standard coins in circulation of the various nations of the world is estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury pursuant to statute (28 Stat. L. 552).

See

Cramer v. *Arthur*, 102 U. S. 612;
Grant v. *Maxwell*, Fed. Cas. No. 5699.

The law applicable to the valuation of foreign currencies for customs purposes, it is true, does not afford a sufficient guide for a court of law or equity in solving the problem of translating values of foreign currencies into American dollars, excepting in so far as it shows that even in connection with customs valuations, requiring uniformity in the application of the law, a marked depreciation in the currency from the par of exchange must be taken into consideration. A court, in the exercise of its judicial function, must look to the specific facts of each case, and, where the par of exchange of any two currencies has ceased to express the true relation between them and has become purely nominal, it should make its valuation on the basis of the true or real par.

Where there is no established par, or where the nominal par value has ceased to be the true par because of a depreciation of the currency, the rate of exchange must of necessity be used as the nearest approximation of what the true par would be. (Story on Conflict of Laws, 8th Ed., p. 426).

As the Trial Court itself found (R. 70) the value of the mark, at exchange, in March, 1923, was .0048 of one cent,

and its value on July 2, 1921, on the termination of the war, when intercourse with German nationals was again permitted, was only 1.35 cents per mark. While recognizing the low value of the mark in exchange, and the tremendous depreciation of the mark, the court attempts to avoid giving effect to such recognition by stating that

> "There is no evidence to show the domestic value of the German mark, nor whether the decline in the rate of exchange as shown in this country correctly expresses the decline in its value in Germany."

The rate of exchange is of course the only proper and effective method of determining the value of the money of one country or nation in that of another, or of measuring property or other values in different currencies. The whole world was aware of the decline of the purchasing power of the mark—not only abroad, but in Germany. The district and circuit court of appeals ignored an economic situation familiar to every "doughboy" in the American Army of Occupation.

The court did not need to look beyond the record of this case, even if it could properly decline to consider exchange rates, to obtain some knowledge of the domestic or the intrinsic value of the mark. The tremendous appreciation in value in marks of the Friedrichsfeld plant, namely, from a book value of 287,489.66 marks and an actual value of 635,028 marks on April 6, 1917, to a value in marks of 81,000,000 marks at the time of trial, is in itself sufficient and conclusive evidence of the tremendous decline in the intrinsic and domestic value of the mark.

To employ the par of exchange to determine the dollar equivalent of Richard Mayer's distributive share of the German assets, as the District and Circuit Court of Appeals did, is to allocate to Richard Mayer, whose original investment amounted to only 7% of the aggregate capital of the firm, and whose share in the profits was only 20% of the total profits, substantially the entire wealth of the partnership. The German partners are in effect required to pay

him out on the basis of gold while they are left with the worthless paper marks as the bulk of their share.

Normally, and but for the intervention of war and of the Trading with the Enemy Act, with its sequestration of the property of German nationals in the United States, the partnership accounting would have been had at the head office at Friedrichsfeld, and in determining Richard Mayer's distributive share the assets in the United States would have been converted into marks at the prevailing rate of exchange, making many millions or billions of marks. Richard Mayer's distributive share would have been expressed and paid in marks, and with marks he would have bought exchange on New York or Boston to bring back to this country the proceeds eventually resulting to him upon the ultimate acts of winding up the partnership. If the liquidation and accounting had been effected in this way, Richard Mayer would have received the same amount that the defendant German partners and the Alien Property Custodian now claims he is entitled to receive.

FOURTH.

The Court erred in holding and ruling that the sum of marks 956,814.31 set aside by the German defendants for reserves should not be included among the liabilities, to the payment of which the defendant, Richard Mayer's share should contribute. 500,000 marks of said reserves constituted a partnership liability.

Edwin Reis testified regarding the reserves set up by the firm, prior to the dissolution, substantially as follows (R. 87):

(1) 50,000 marks reserves were set up December 31st, 1916, for pensions to employees who were informed of this reserve. The firm thereafter considered it a debt.

(2) 500,000 marks reserves for losses on contracts; 200,000 marks of this fund were set up at the end of 1916, the other 300,000 marks were set up some time before. This reserve was not a general one against future possible contract liabilities, but was set up against certain specific contracts to furnish merchandise which the firm had undertaken at low prices before the war, and which had to be fulfilled after the war. At the time the reserves were set up the selling price was already much less than the cost to the firm. It was against these losses in fulfilling orders that they were obliged to set up this reserve. The reserve was exhausted during the years 1918, 1919 and 1920.

(3) 300,000 marks reserves against losses which would occur in the transition period after the war. It was a reserve to meet expected changes in the value occurring in the transition period after the war. It was a reserve that was allowed to be set up by the German law. In the opinion of the firm and their chartered accountants it was necessary to make these reserves, and they were later found to be too small.

The Court below has disallowed a credit claim of the German partners for all three reserves, making no distinction between the nature of them. The first and the third reserves above enumerated might well be regarded as properly chargeable to the German partners alone, since they were set up to meet contingencies arising strictly in connection with a continuing business in which Mayer's liability, after the dissolution by war, was limited. The 50,000 marks reserves for pensions to employees was made to meet payments in the nature of gifts and gratuities.

The 300,000 marks reserves against losses in the transition period after the war likewise must be charged to the German partners on a partnership accounting. In view of the fact that they provided against losses to be sustained, not merely in the performance of old contracts, existing prior to the dissolution, but to meet emergencies in a business continuing after dissolution, in which Mayer's liability as against incurring new obligations was limited. He was

entitled to share in all profits made, but he did not have to contribute to losses due to a continuance of the business. For any such newly incurred liabilities the German partners alone were responsible. After the profits which they made with the use of partnership assets in a continuing business were ascertained, Mayer would be entitled to share in such profits by way of compensation for the use of his capital.

The 500,000 marks reserves for losses on contracts actually existing at the time of dissolution stands on an entirely different footing. Edwin Reis expressly testified that this reserve was not a general one against future possible contract liabilities, but was set up against certain specific contracts to furnish merchandise which the firm had undertaken, before the war, at low prices, and which had to be fulfilled after the war. Insofar as 500,000 marks was actually expended in connection with the aforesaid contracts they became necessary expenditures attending the liquidation. A partner's liability after dissolution, though limited, as regards new enterprises, continues as regards the completion of unfulfilled contracts pending at the time of the dissolution. The obligations existing under the said contracts constitute actual liabilities of the firm, existing at the time of dissolution. This reserve should have, therefore, been allowed as a proper expenditure, and Richard Mayer's share in distribution should be held to contribute to said reserve. The Court below, however, held:

> "There is no testimony to show how much of this amount was paid out before April 6th, 1917, and I therefore do not include among the liabilities to the payment of which Mayer's share is to contribute the amount set aside for reserve" (R. 69).

The Court made no distinction between this reserve and the two others mentioned. As regards this reserve, it was entirely immaterial when the sum set aside was expended so long as it was actually paid out. Edwin Reis' testimony (R. 87) shows that this reserve was used up in 1918, 1919 and 1920.

FIFTH.

The Court below erred in failing to hold and rule that the claims of Ely, Leiser, Sanft and Heinstein for percentages of profits of the firm constitute a liability of the firm, and in failing to make provision in the decree for the payment of these liabilities.

Edwin Reis testified (R. 83) that certain employees were entitled to a share or percentage of the profits of the entire business of Reis & Co., including the profits of the branch houses. One of these employees was Ely, who was entitled to 5% of the profits, the agreement with him being dated May 22nd, 1913, and having been written out by Richard Mayer himself (see Defendants' Exhibit VI; R. 139).

Another employee was Mr. Leiser, who was also entitled to 5% under a written agreement, dated May 29th, 1913 which remained in force until November 30th, 1913. Thereafter the agreement was renewed. The agreement is in evidence as Defendants' Exhibit VII; (R. 141, 143).

Another employee was Adolph Sanft, who was entitled to ½% under an agreement, dated May 12th, 1913, which had no fixed duration. (See Defendants' Exhibit VIII, R. 144).

Another employee, Heinstein, was entitled to a 1% bonus on all the profits of the firm. This agreement was dated December 18th, 1910, and was for an indefinite period. (See Defendants' Exhibit IX, R. 144).

> "All four employees were in the actual employ of the firm when Richard Mayer became a partner, and continued in the employ of the company and were in such employ on April 6th, 1917 and later. Richard Mayer was fully informed about all the agreements with the employees for percentages of profits at the time he came into the partnership" (R. 84).

In addition to the four employees mentioned Jules Laible also was entitled to a percentage of the profits in both the German and the American branches of the business. He has been paid in full, excepting only for his claim for interest, which was still in litigation, the amount of $7,000 having been paid to Edward F. McClennen, as an officer of the Court, pursuant to the decree of the Court below; the Court stating:

> "If all or any part of said sum is not required to satisfy the judgment which Laible may recover, then the whole or any unexpended balance is to be paid, 80% to the Alien Property Custodian and 20% to Mayer" (R. 73).

The other employees have not brought suit upon their claims, as yet. Their claims, however, are for definite percentages of the profits aggregating in all 11½% of the profits of both the German and American branches. They have been paid their share of the profits of the German business. Their right to receive the unpaid portion of profits due them constitutes an existing liability of the firm. Insofar as that liability existed on April 6th, 1917, Richard Mayer must be required to contribute to the extent of 20% of that liability. Thereafter he was not obliged to contribute to liabilities in a continuing business. What, then, was the amount of the total maximum liability to which his share is required to contribute as of April 6th, 1917?

In view of the fact that moneys due to the aforesaid employees do not appear as liabilities of the German business in the account of the German partners, as of April 6th, 1917, the German partners must be taken to have paid all bonuses up to 1917 from the firm assets on hand. Since the last inventory including all branches of the business as of November 30th, 1913 (R. 118), and after the year 1914, the American assets were no longer carried on the books in Friedrichsfeld, and the extent of any profits made in America through the instrumentality of the Richard Mayer Company or the Anglo-American Cotton Company was, therefore, not known to the German partners. The Richard Mayer Export Department,

of course, could not have made any profit since it operated purely as a buying and selling agency for the German business.

It appears from Reis' testimony that $600,000 of the moneys in Richard Mayer's hands were kept here from remittances sent by the German partners on which it is likely that the employees claiming bonuses may have already received their percentage. The $600,000 must therefore, be eliminated from consideration as profits derived from the American business. The remaining amount in Richard Mayer's hands, which on April 6th, 1917, was concededly $310,000, consisted of profits, at least to the extent indicated on Exhibit C of Plaintiff's Exhibit V (Haskins & Sells report of Richard Mayer Company), and to the extent indicated on Exhibit B of Plaintiff's Exhibit VI (Haskins & Sells report of Anglo American Cotton Company). These profits aggregated $286,337.78 up to December 31st, 1916 (see exhibits mentioned). 11½% of said profits constitute a liability, to the payment of which the German partners must contribute 80%, and to the payment of which Richard Mayer should contribute 20%. Provision should, therefore, be made before arriving at the surplus to be surrendered to the custodian for either, the sequestering of $32,928.84, or else a provision should be incorporated in the decree requiring the parties to contribute in proportion to their respective percentages to the payment of any of the aforesaid claims.

SIXTH.

The Court below erred in disallowing the sum of 266,432.40 marks paid by the German partners for taxes and the sum of 50,400 marks paid by the German partners to Mayer's relatives at his request.

Prior to April 6, 1917, and acting under a law passed in June, 1916, the German Government levied taxes on the increase of Mayer's share of the German assets during the years 1914, 1915 and 1916 (R. 83, 87 and 154).

The tax amounted to 266,432.40 marks and was paid by the German partners in 1917 after the outbreak of the war (R. 83, 87 and 154) in order to protect Mayer's interest in the German assets which could have been seized by the German Government as a tax enforcement measure (R. 84, 154). The District Court charged Mayer with this amount (R. 71) but the Circuit Court of Appeals disallowed it as an item of charge (R. 154).

The tax was levied upon Mayer's interest in the German assets which were still in Germany and subject to distraint at the hands of the German Government and it became the duty of the German partners as fiduciaries to protect his interest. The German partners would have been chargeable on an accounting had a loss been sustained through seizure of the assets because of their failure to pay the taxes. The payment of taxes may also be justified on the theory that the German partners were acting as agents by necessity.

The District Court also allowed as a charge against Mayer the sum of 50,400 marks paid by the German partners at his direction to his relatives in Germany (R. 71). The Circuit Court of Appeals disallowed this item (R. 154). Of this sum 600 marks was paid before the declaration of war and the balance thereafter (R. 154). In 1914 when Mayer

was in Germany he requested and authorized his German partners to make these payments (R. 71, 83, 84 and 154). This authority was never revoked. The payments were in the nature of advances to Mayer and charged to his personal account.

SEVENTH.

The Court erred in ruling that the defendant Richard Mayer is accountable for the sum of only $828,072.72.

At the date of dissolution of the partnership at the outbreak of the war, it is conceded that the value of the American assets in the possession of Richard Mayer was $910,014.07. The value of the assets at the time of trial amounted to only $828,072.72, the difference between the two figures being accounted for by the total loss of the assets of the Anglo-American Cotton Co. This loss occurred partly before the assets were seized by the Custodian, and partly during the time he held them.

At the trial, counsel for the Alien Property Custodian consented to accept $828,072.72 as the correct figure for which Richard Mayer is accountable, on condition that the accounting proceed as of the time of the trial, and that all losses of partnership property be apportioned equally among all partners. Strictly speaking, Richard Mayer must be held accountable for so much of the losses that occurred in connection with the American assets as took place before they were seized by the Custodian. The German partners feel bound, however, by the waiver of any surcharge, made by counsel for the Custodian, provided that waiver be not extended beyond the scope to which it was limited by counsel for the Custodian.

EIGHTH.

The Court erred in allowing Mayer's claim for the premium paid by him in connection with the bond he furnished to the Alien Property Custodian and also in allowing counsel fees.

No credit is to be allowed Richard Mayer for any premiums paid by him in connection with the bond he furnished to the Alien Property Custodian in order to obtain a surrender of the firm property in advance of an accounting.

According to the decree of the Court in *Mayer* v. *Garran*, the Custodian, under the power vested in him with the Trading with the Enemy Act, had a right to demand some security from Richard Mayer for the payment of any surplus that might be found due on an accounting, particularly in view of Mayer's claim that he owned the partnership assets in his hands in his own right.

Richard Mayer, for the purpose of inducing the Alien Property Custodian to refrain from taking an appeal from the decision in *Mayer* v. *Garran* (*supra*), himself furnished the bond. The bond, therefore, must be deemed to have been given, not for the protection of the surplus, but rather in order to prevent the Alien Property Custodian from pressing an appeal to the Supreme Court of the United States. The expense of the bond was not incurred by Richard Mayer in the performance of his duties as a liquidating partner, for his failure to liquidate was attended by a hostile claim of ownership of the American firm property in his own right, in derogation of the rights of the German partners or the Alien Property Custodian. The bond was given distinctly for his own personal benefit in order that he might obtain possession of the assets without an appeal.

In the absence of any express agreement between Mayer and the Custodian regarding the payment of the premium, no such agreement should be implied. Richard Mayer paid the premium and received the property. It constitutes no firm obligation, and was not an expense incurred on account of liquidation.

With regard to the claim for counsel fees, the same argument holds, that Mayer's assertion of title to firm property in his own right against the Custodian was in derogation of the rights of the German partners. That expense was not incurred in connection with liquidation but rather in an effort to prevent it. In the absence of express statutory authority the German partners' share may not be required to contribute to such an expenditure. The Court said, in the case of *Grant* v. *Fletcher*, 283 Fed. 243, 274, in reference to plaintiff's claim for a special allowance to be paid by the defendants on account of expenses and attorney's fees:

> "I am satisfied that the law does not permit me to make such allowance. No extra allowance can be granted in the absence of such statutory authorization."

Mayer was a private litigant in incurring the expense of counsel. The share of the German partners should contribute only to the extent of counsel fees incurred by the Government.

NINTH.

The correct computation of Richard Mayer's distributive share of the proceeds of all the assets.

Richard Mayer is entitled to his capital contribution, and in addition thereto, to twenty per cent. of the profits. His capital contribution has been allowed him in computing his distributive share in marks of the German assets as of April 6th, 1917, which was computed as of that time for the

sole purpose of limiting any further liability on his part in a going business. The Record, at page 190, shows that this amounts to 1,905,860.87 marks. To this figure should be added the gain derived from the sale of the Herzberg and Frazenthal plants, which, carried on the books at their actual value, nevertheless were sold at a higher figure on account of the diminished purchasing power of the mark at the time of sale. Twenty per cent. of such gain amounts to 227,734.95 marks. To this should be added Mayer's share of the unsold fixed asset, the Friedrichsfeld plant, the value of which has been agreed upon in the sum of 81,000,000 marks. Its actual value on April 6th, 1917, was 635,028 marks. The difference between the actual value of the Friedrichsfeld plant on April 6th, 1917, and the agreed value of March 26th, 1923, is 80,364,972 marks. Twenty (20%) per cent. of this difference to be credited to Richard Mayer amounts to 16,072,995.40 marks (Defendant's Exhibit XIII, R. 146, 147).

The total value of Richard Mayer's share is therefore found to be 18,206,591.22 marks, exclusive of any profits earned since April 6, 1917, or of interest in lieu of profits. Inasmuch as the assets representing Mayer's capital were used by the German partners in a continuing business, and profits were earned by the use of those assets, some compensation must be awarded Mayer for that use.

Ordinarily, the value of the use of such capital would be the profits actually earned by it, as distinguished from the profits attributable to the skill of the partners using the capital. As a practical matter, it is often difficult to determine what part of the profits made, is due to the use of the capital as such, and what part to the business skill and judgment of the partners continuing the business.

In the case at bar, whatever difficulty might otherwise arise, has been eliminated because of the fact that the German partners make no claim to any profits as being attributable solely to their own skill.

Edwin Reis, at the trial, claimed "that the distributive share of Richard Mayer in the European assets of the firm,

as of March 27th, 1923, is about 27,000,000 marks" (R. 84). This figure includes the profits made from April 6th, 1917, to March 27th, 1923, the date of the giving of the testimony, the difference between that figure and 18,206,591.22 marks being Mayer's percentage of the total profits earned in that period.

If the Court should feel that profits should be awarded to Richard Mayer as compensation for the use of his capital in a going business by the German partners, his share inclusive of profits is, therefore, correctly ascertained to be 27,000,000 marks. If this Court should feel that profits should not be awarded to Richard Mayer, as compensation for the use of his capital in a going business, after the dissolution, but that interest should be awarded him, in lieu thereof, on the capital representing his share of the assets, which was used by the German partners in a going business, the amount of interest to be awarded him would be found by computing interest at the rate of six (6%) per cent. per annum for eight years on 1,905,860.87 marks, amounting to 914,813.22 marks. Adding this figure to the present value of his share, exclusive of profits, namely, 18,206,591.22, the total mark value of Mayer's distributive share of the proceeds of the German assets is found to be 19,121,404.44 marks.

By awarding Richard Mayer interest for the use of his capital in a continuing business, in lieu of profits, the Court does not in any sense attribute to Mayer's distributive share in the German assets, as of April 6th, 1917, as now ascertained, the quality of a debt, for it is not awarded as interest on a debt, but as an approximation of profits that cannot be, or have not been, accurately ascertained.

Thus, although interest does not run on a debt during war as was held in the case of *Brown* v. *Hiatts*, 15 Wall. 177, interest as here used in lieu of profits that cannot be accurately fixed, continues throughout the war and is awarded for the period covered by the war.

The use of the word "interest", here, in similar to the use of the word "profits" in the case of an employee who

receives profits, not as such, but as a measure of compensation.

That the word "interest" as here used is not true interest in the sense of interest on a debt is further shown by the fact that interest on a partner's distributive share does not begin to run until the amount of that share has been ascertained on a balance struck on a partnership accounting.

See

Dexter v. *Arnold*, Fed. Cas. No. 3855, 3 Mason, 289;
Moore v. *Rawson*, 185 Mass. 264;
Bradley v. *Bingham*, 137 Mass. 535, 546;
Crabtree v. *Randall*, 133 Mass. 552;
Miller v. *Lord*, 11 Pick. 11, 26.

The rate of exchange on the fifth day of the trial, March 30th, 1923, was testified to as $46.50 per million, or $.0000465 per mark. Translating 27,000,000 marks at this rate into dollars, Mayer's share of the proceeds of the German assets, in terms of dollars, amounts to $1,255.50. Using the figure reached by awarding him interest in lieu of profits, namely, 19,121,404.44 marks, and translating that into dollars at the same rate, the value of Mayer's share of the proceeds of the German assets is $899.15.

Either of these two amounts is to be allowed Richard Mayer as a credit on his accounting with the Alien Property Custodian for his distributive share of the proceeds of the German assets. In addition to that, Mayer is entitled to twenty per cent. of $828,072.72, the American assets, amounting to $165,614.54.

Respectfully submitted,

JOHN CALDWELL MYERS,
Attorney for Edwin Reis, *et al.*

JOHN W. DAVIS,
Of Counsel.

CONTENTS

	Page
Previous decisions in these cases	1
Grounds for the jurisdiction of this Court	2
Statement of the cases	3
The decision of the District Court	9
The decision of the Circuit Court of Appeals	12
Specifications of assigned errors intended to be urged	14
Contentions of the parties	14
Argument:	
I. THE COURT ERRED IN ADOPTING THE PAR OF EXCHANGE AS THE BASIS FOR DETERMINING IN DOLLARS THE CREDITS TO WHICH MAYER WAS ENTITLED IN RESPECT TO THE ASSETS LOCATED IN GERMANY, INSTEAD OF USING THE RATE OF EXCHANGE EXISTING AT THE TIME OF PROVING THE ACCOUNT	20
(A) THE OWNERSHIP OF THE PARTNERSHIP PROPERTY WAS NOT ALTERED PRIOR TO THE ACCOUNTING	
(1) THE DECLARATION OF WAR BETWEEN THE UNITED STATES AND GERMANY DID NOT ALTER THE OWNERSHIP OF THE PARTNERSHIP PROPERTY IN THE RESPECTIVE COUNTRIES	20
(2) THE OWNERSHIP OF THE PARTNERSHIP PROPERTY WAS NOT PRIOR TO THE ACCOUNTING ALTERED BY THE ACTS OF THE PARTIES	26
(B) THE CONDITIONS EXISTING SUBSEQUENT TO APRIL 6, 1917, AND PRIOR TO THE FILING OF THE BILL OF COMPLAINT IN THIS SUIT, RENDERED ALL LOSSES TO PARTNERSHIP ASSETS, NOT DUE TO THE NEGLECT OR FAULT OF ANY PARTNER, A PARTNERSHIP LOSS	32
(C) THE DETERMINATION, THEREFORE, OF THE RESPECTIVE RIGHTS AND INTERESTS OF THE PARTNERS MUST BE MADE IN RELATION TO THE EXTENT AND CHARACTER OF THE PARTNERSHIP ASSETS EXISTING AT THE TIME OF THE ACCOUNTING, AND THE ADJUSTMENT OF THEIR RESPECTIVE INTERESTS IN TERMS OF DOLLARS MUST BE MADE IN RELATION TO THE RATE OF EXCHANGE THEN PREVAILING	37

Page

II. The court erred in crediting Mayer with the expenses incurred by him in connection with the suit of Mayer *v.* Garvan ---- 43

III. There was no error in failing to allow Mayer interest on his distributive share ---- 47

(A) Mayer is not entitled to charge interest as against his German partners ---- 48

(B) Mayer is not entitled to interest as against the plaintiff ---- 49

Conclusion ---- 50

TABLE OF CASES

Adams v. *Cordis*, 8 Pick. 260 ---- 41

Bayly v. *Becnel*, 30 La. Ann. 75 ---- 49

Beam v. *Macomber*, 33 Mich. 127 ---- 36

Betts v. *June*, 51 N. Y. 274 ---- 36

Boddam v. *Ryley*, 1 Brown, Ch. 239 ---- 49

Bradley v. *Brigham*, 137 Mass. 545 ---- 48

Busch v. *Clark*, 127 Mass. 111 ---- 25

Case v. *Abeel*, 1 Paige 393 ---- 25

Charlton v. *Sloan*, 76 Ia. 288 ---- 36

Clay v. *Field*, 138 U. S. 464 ---- 29, 30

Coe, In re, 157 Fed. 308 ---- 26

Cooke v. *Benbow*, 68 Eng. Ch. 1 ---- 48

Cramer v. *United States*, 7 Ct. Cl. 302 ---- 23

Crane v. *French*, 1 Wend. 311 ---- 26

Daniels v. *McCormick*, 87 Wis. 255 ---- 49

Dexter v. *Arnold*, 3 Mason 289, Fed. Cas. 3855 ---- 49

Di Ferdinando v. *Simon, Smits & Co.*, (1920) 3 K. B. D. 409 ---- 42

Doner v. *Stauffer*, 1 Rawle, Penrose & Watts, 198 ---- 26

Douglas v. *United States*, 14 Ct. Cl. 1 ---- 23

Edith, The, Fed. Cas. No. 4281 ---- 34

Esposito v. *Bowden*, 7 E. & B. 763 ---- 21

Evans v. *Evans*, 9 Paige, 178 ---- 25

Ewing v. *Ewing*, L. R. 8 A. C. 822 ---- 48

Fordyce v. *Shriver*, 115 Ill. 530 ---- 36

Fox v. Hanbury, 2 Cowp. 445 ---- 26

Freeman v. *Freeman*, 136 Mass. 260 ---- 24

Gordon v. *United States*, 7 Wall. 188 ---- 50

Grant v. *Fletcher*, 283 Fed. 243 ---- 47

Grant et al. v. *Healey*, Fed. Cas. No. 5696 ---- 41

Griswold v. *Waddington*, 16 Johns 438 ---- 23

Guinness et al. v. *Hicks*, Nos. 80, 81, Oct. term, 1925 ---- 42

Hart v. *Hart*, 117 Wis. 639 ---- 48

Habricht v. *Alexander*, Fed. Cas. No. 5886 ---- 21

Hill v. *King*, 8 L. T. Rep. (N. S.) 220 ---- 48

Hoppe v. *Russo-Asiatic Bank*, 235 N. Y. 37 ---- 42

James, In re, 146 N. Y. 78 ---- 49

	Page
Johnson's Appeal, 115 Pa. 129	36
Johnson v. *Harthshorne*, 52 N. Y. 173	48
Jones v. *Dexter*, 130 Mass. 380	36
Jones v. *Jones*, 36 N. C. 332	49
Julia, The, 8 Cranch, 181	21
Katcher v. *American Express Co.*, 94 N. J. L. 165	42
King v. *Hamilton*, 16 Ill. 190	49
Knipe v. *Livingston*, 209 Pa. 49	36
Lees v. *LaForest*, 14 Beav. 250	36
Martin v. *Franklin*, 4 Johns. 124	41
Mayer v. *Garvan*, 270 Fed. 229, aff. 278 Fed. 27	4, 7, 20, 22, 43
McLaren, In re, 125 Fed. 835	26
Miller v. *Lord*, 11 Pick. 11	49
Moore v. *Huntington*, 17 Wall. 417	24, 29
Murphy v. *Camac*, Fed. Cas. 9948	41
Pierce v. *Jackson*, 6 Mass. 242	26
Rapid, The, 8 Cranch, 155	21
Robson v. *Premier Oil & Pipe Line Co. Ltd.*, (1915) 2 Ch. 124	21
S. S. Celia v. *S. S. Volturno*, (1921) L. R. 2 App. Cas. 544	42
Scott v. *Hornsby*, 1 Call (Va.) 35	41
Simonoff v. *Bank*, 279 Ill. 248	42
Smith v. *Knight*, 88 Ia. 257	49
Smith v. *Smith*, 18 R. I. 722	48
Stevenson & Sons, Ltd. v. *Aktiengesellschaft, L. R.* (1918) A. C. 239	23
Taylor v. *Fields*, 4 Ves. Jr. 396	26
Wedderburn v. *Wedderburn*, 22 Beav. 84	25
West v. *Skip*, 1 Ves. Sr. 239	20
Whitney v. *Dewey*, 158 Fed. 385	36
Witter v. *Richards*, 10 Conn. 37	26
United States ex rel. Angarica v. *Bayard*, 127 U. S. 251	50
United States v. *Grossmayer*, 9 Wall. 72	21
United States v. *Verdier*, 164 U. S. 213	50

TABLE OF STATUTES

Judicial Code:	
Sec. 241 (c. 231, 36 Stat. 1087, 1157)	2
Trading with the Enemy Act:	
Sec. 2 (c. 106, 40 Stat. 411)	21
Sec. 3 (c. 106, 40 Stat. 412)	21
Sec. 7–c (c. 106, 40 Stat. 418)	4
Sec. 7–c, as amended November 4, 1918 (c. 201, 40 Stat. 1020)	4
Sec. 8–a (c. 106, 40 Stat. 418)	44
Sec. 17 (c. 106, 40 Stat. 425)	2
Bankruptcy Act of 1898:	
Sec. 5–a (c. 541, 30 Stat. 547)	26

TEXTS

Page

Lindley on Partnership (4th Ed.), 569, 666, 1015, 1016, 1041, 1046 ---------- 25
Story on Partnership (7th Ed.), sections 328, 344, 347, 350, 355 ---------- 25
Collyer on Partnership (6th Ed.), sections 623, 624 ---------- 25
Lewin, Trusts (7th Ed.), 255 ---------- 25

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 232

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, Appellant

v.

RICHARD MAYER, EDWIN REIS, KARL B. STRAUSS, et al., etc.

No. 233

RICHARD MAYER, APPELLANT

v.

HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN, Edwin Reis, Karl B. Strauss, et al., etc.

No. 234

EDWIN REIS, KARL B. STRAUSS, AND ANNY REIS, etc., Appellants

v.

RICHARD MAYER AND HOWARD SUTHERLAND, AS Alien Property Custodian

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF ON BEHALF OF HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN

PREVIOUS DECISIONS IN THESE CASES

The opinion of the Circuit Court of Appeals in these cases is reported in 1 F. (2d) 419. (R. 149–155.) The opinion of the District Court has not been reported but it will be found on pages 68 ff. of the Record.

GROUNDS FOR THE JURISDICTION OF THIS COURT

Case No. 232 is before this Court upon an appeal by the Alien Property Custodian, plaintiff in the District Court, from a final decree of the Circuit Court of Appeals for the First Circuit, dated September 18, 1924 (R. 155, 156), which affirmed with modifications a decree of the District Court of the United States for the District of Massachusetts, entered October 2, 1923 (R. 66).

Cases No. 233 and No. 234 are before the Court upon cross-appeals prosecuted, respectively, by Richard Mayer, a defendant in the District Court, and by Edwin Reis, Karl B. Strauss, and Anny Reis, as trustee for Anneleise Reis and Ruth F. Reis from the same decree of the Circuit Court of Appeals for the First Circuit. (R. 155, 156.) These appeals have been prosecuted pursuant to Section 241 of the Judicial Code. (c. 231, 36 St. 1087, 1157.) The appeals were all allowed during the month of December, 1924 (R. 156, 159, 162), and consequently are not controlled by the Act of February 13, 1925.

The authority of the District Court to deal with the cases is found in Section 17 of the Trading with the Enemy Act (c. 106, 40 Stat. 411, 425) by which section the provisions of the Judicial Code with respect to appeals are extended to the provisions of the Trading with the Enemy Act.

STATEMENT OF THE CASES

These cases were begun by a suit instituted by Thomas W. Miller, then Alien Property Custodian, in the District Court of the United States for the District of Massachusetts on September 1, 1922, against Richard Mayer, a citizen of the United States, Edwin Reis, Karl B. Strauss, Estate of Ludwig Reis, and Anny Reis, as trustee of Anneleise Reis and Ruth F. Reis, all of whom were citizens and residents of Germany, and the Richard Mayer Company and the Anglo-American Cotton Company, corporations organized under the laws of the Commonwealth of Massachusetts, to compel Richard Mayer to account to the Alien Property Custodian for the interest of Edwin Reis, Karl B. Strauss, Estate of Ludwig Reis, and Anny Reis as trustee for Anneleise Reis and Ruth F. Reis (hereinafter referred to as enemies) in American assets of a partnership doing business under the name of Reis & Company, which was composed of Richard Mayer and the enemies (R. 1 to 11), which enemy interest had been duly determined and demanded by the Alien Property Custodian (R. 12 to 26, inclusive).

The stock of the defendant corporations was equitably owned by Reis & Company although from time to time this stock stood in the name of various employees of the corporations.

The enemy defendants entered a general appearance in the case and submitted themselves to the jurisdiction of the court.

Originally the Alien Property Custodian had secured possession of all the American assets of the partnership which was known as Reis & Company, pursuant to his demands. It was determined in the former case of *Mayer* v. *Garvan,* 270 Fed. 229, aff. 278 Fed. 27, that Mayer was entitled to retain the American assets of the partnership in his possession until the determination of the amount due him on an accounting.

Pursuant to the decision in that case the Custodian returned to Mayer all of the American assets of the partnership and after Mayer had failed to make an accounting satisfactory to the Custodian he brought this suit to compel an accounting by Mayer for the enemy interest in the assets. It is from the decree of the Circuit Court of Appeals affirming and modifying the District Court decree which stated an account, that these appeals are taken.

The Alien Property Custodian, under the provisions of Subsection (c) of Section 7 of the Trading with the Enemy Act (c. 106, 40 Stat. 411, 418), and Subsection (c) of Section 7 as amended November 4, 1918 (c. 201, 40 Stat. 1020), is admittedly entitled to all of the American assets of Reis & Company except the distributive share of Mayer.

The bill of complaint set forth the partnership agreement (R. 7 ff.), the determination of enemy ownership, and the seizure of the partnership assets by the Alien Property Custodian, the former suit by Mayer for the return of those assets, and the

decree therein, and prayed that Mayer and his enemy partners be severally ordered to disclose the present value in cash of the assets of the partnership within their possession or control, that an accounting be had, that Mayer be charged with losses occasioned by his misuse of the partnership funds, and credited with the value of his interest in the European assets, and ordered to pay over to the plaintiff the surplus, if any, which remained out of the American assets after the satisfaction of the amount due him.

The answer of the defendants, Mayer, the Anglo-American Cotton Company, and the Richard Mayer Company will be found on pages 27 ff. of the Record, and the answer of the enemy partners will be found on pages 34 ff. of the Record. Mayer annexed to his answer a copy of a document addressed by him to the Alien Property Custodian in June, 1922, and entitled "An Accounting." (R. 27.)

The German defendants by answer under oath set forth the value of the European assets and Mayer's interest therein.

Defendant Edwin Reis produced the partnership books of account at the trial and testified concerning the value of the European assets. Mayer was present in court but did not testify.

The partnership agreement was made in Germany on May 24, 1913. A translation thereof is annexed to the plaintiff's bill (R. 7), and is admitted by Mayer in his answer (R. 27). Mayer contributed his business in Boston, which he guar-

anteed to be worth 200,000 marks. After inventory it was credited to him on the partnership books at 206,054.02 marks. (Plaintiff's Exhibit 11, R. 131, 132.) He contributed no further capital to the firm. The other partners contributed 2,655,025.03 marks. (Partnership Agreement, Par. 7, R. 9.) Each partner was to have 4½ per cent interest on his capital. The Reises were each to have yearly salaries of 22,000 marks, Strauss and Mayer salaries of 20,000 marks and 16,000 marks, respectively. The profits were to be shared 27½ per cent to each of the Reises, 25 per cent to Strauss, and 20 per cent to Mayer. The profits were to be credited to the capital accounts of the several partners. (Agreement, Par. 10, R. 10.) Interest and salaries were the only withdrawals permitted under the agreement.

The "Main Seat" of the partnership was at Friedrichsfeld, Germany. The firm had branches at Manchester, England, and at Boston, Massachusetts. The assets and liabilities of both these branches were kept on the Friedrichsfeld books (R. 81, 82) until after the European war made communication difficult or impossible. The American partner stopped sending regular reports late in 1914 or early in 1915.

On April 6, 1917, when war was declared to exist between the United States and Germany, the partnership assets in Mayer's possession are admitted by Mayer to have had a value of $910,014.07. (Mayer's Answer, Ex. A., R. 31.)

The value of his share in the European assets of the firm, including his capital contribution, was found by the District Court to be 2,097,223.72 marks on that date. (R. 71.) Under the German law the partnership was not dissolved by the entry of the United States into the war, as the court found in the former case. (See Par. 4 of Final Decree in *Mayer* v. *Garvan,* R. 3.)

Mayer admits himself to be accountable for $828,072.72. This represents the cost price of the securities returned to him by the Custodian in June, 1922, and the book value of the stock of the Richard Mayer Company. (Mayer's Answer, R. 33, 34.) The Alien Property Custodian conceives the true rule of accounting to require the loss in the American assets, occuring without fault of either party after dissolution of the firm and before an accounting, to be borne ratably by the partners. The Alien Property Custodian contends that the same rule must be applied to the European assets. The depreciation of the German currency in which the European assets are measured, and of which those assets mainly consisted, must be borne ratably by all the partners down to the date when their rights have been fixed by an accounting. This proceeding is for an accounting to fix those rights. It is the first accounting ever held.

In the former case of *Mayer* v. *Garvan,* Mayer contended that no accounting was necessary. He claimed to own the American assets by virtue of an

alleged dissolution agreement, which was there adjudged to be "void and of no effect." It was further adjudged that upon the evidence there presented—

> this court is unable to state an account as between the parties, or Richard Mayer and the Alien Property Custodian, there being no evidence of the actual value of the American property or of the German or English property and there being no evidence of the liabilities of the firm.

(Par. 9 of final decree in *Mayer* v. *Garvan*, R. 4.) Pending the time when evidence should be available to permit such accounting, Mayer was awarded possession of the American assets of the firm.

The necessary evidence was first rendered available to the Government in this proceeding by the voluntary appearance of the German partners and the production of their books, including the books withheld in the former suit. Oral testimony as to the value of the European assets was also produced. Thus in this proceeding it for the first time became possible to state in dollars and cents how much the Government is entitled to receive as the enemy share of the American assets of the firm.

That the enemy partners own 80 per cent of the net assets of the partnership, after deducting the capital contributions, is not disputed. Nor is it disputed that there has been no accounting since the dissolution of the partnership by the outbreak of war.

THE DECISION OF THE DISTRICT COURT

The District Court, after considering the accounts rendered by the German partners and after receiving oral and documentary evidence thereon, found the net value of Mayer's share in the European assets of the firm to be 2,097,223.42 marks, and ruled that the German partners should account for such amount "as of April 6, 1917." It was found that the nearest date to April 6, 1917, when a rate of exchange was quoted was March 30, 1917, when the value of the German mark was about 18 cents; that the first quotation thereafter was sometime in 1919, when the value of the mark was 7⅞ cents; that on June 2, 1921, "when the state of war was declared to be at an end by the Act of Congress, the German mark had declined to 1.35 cents"; and at the time of the beginning of the hearing in the District Court, March 26, 1923, its value was 0.0048 cents. Nevertheless, in translating the amount of this interest into dollars the trial court disregarded the value of the mark on the date as of which he ruled the accounting should be stated, or on any date subsequent to the outbreak of war when an accounting could be had and settlement made, and applied the theoretical "par of exchange" based on the historical value of "the gold mark."

In determining the distributive share of Mayer in the German assets the District Court disallowed the reserves shown on the books on December 31,

1916, and added to the book value the actual value of land, buildings and machinery in excess of such book value, and Mayer's share in the profits from December 31, 1916, to April 6, 1917. He allowed the charges for taxes and payments made to Mayer's German relatives.

With respect to the date as of which the account should be stated, the court ruled that the accounting should be "as of" the date of dissolution, or April 6, 1917. The court received evidence, however, showing the value of the European assets both on April 6, 1917, and on the date of the hearing, and the German partners stated accounts as of each date.

The court found that (R. 71)—

> The German partners could not determine the distributive share in the firm assets and if they had been able to do so they could not pay any part of his share to him while a state of war continued between Germany and the United States. They are not, therefore, liable for the payment of interest upon his distributive share.

It also found that (R. 72)—

> for the purposes of this accounting, no part of the profits made by the firm in Germany after the outbreak of the war should be added to Mayer's distributive share.

The account as stated by the District Court may be set forth in tabular form as follows:

STATEMENT OF ACCOUNT AS FOUND BY DISTRICT COURT. (R. 68–74)

Mayer's interest in the German assets as shown by the books Dec. 31, 1916		M2, 107, 499. 89
Add: (1) Mayer's interest in the excess value of land, buildings, and machinery over book values		69, 507. 06
(2) Mayer's interest in the Reserves as of Dec. 31, 1916		191, 362. 86
(3) Mayer's interest in the Profits earned between Dec. 31, 1916, and Apr. 6, 1917		45, 686. 31
Total amount of Mayer's interest in the German assets Apr. 6, 1917		2, 414, 056. 12
Deduct: (1) German Government taxes assessed on Mayer's partnership interest	M266, 432. 40	
(2) Payments by direction of Mayer to his relatives in Germany	50, 400. 00	
Total to be deducted		316, 832. 40
Net amount of Mayer's interest in the German assets		2, 097, 223. 72
Value of American assets for which Mayer admits accountability		$828, 072. 72
Deduct: (1) Mayer's interest in the American assets, his interest being 20% of $828,072.72	$165, 614. 54	
(2) Mayer's interest in the German assets (M2,097,223.72) translated into dollars at the rate of exchange of $0.2382 per mark	499, 558. 69	
Total to be deducted		665, 173. 23
Which leaves the Custodian's ascertained share in the American assets		162, 899. 49

THE DECISION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals modified the accounting as rendered by the District Court in certain particulars, all of which modifications were in favor of Mayer. The Circuit Court of Appeals allowed Mayer credit for an item of $4,000, which Mayer paid as a premium upon a bond which he gave the Alien Property Custodian at the conclusion of the case in the Circuit Court of Appeals of *Mayer* v. *Garvan* referred to above.

The Circuit Court of Appeals also disallowed the charge against Mayer for the taxes which had been paid the German Government by the German partners on Mayer's share in the German partnership, and also disallowed the charge against Mayer for payments to Mayer's relatives made by the German partners with the exception of the 600 marks which had been paid prior to the declaration of war between the United States and Germany. The Circuit Court of Appeals also allowed Mayer's counsel fees for the prosecution of the suit of *Mayer* v. *Garvan*. This amount has not been ascertained.

The account as rendered by the Circuit Court of Appeals may be set forth in tabular form as follows:

STATEMENT OF ACCOUNT AS FOUND BY CIRCUIT COURT OF APPEALS. (R. 149–155)

Mayer's interest in the German assets as shown by the books Dec. 31, 1916		M2, 107, 499. 89
Add: (1) Mayer's interest in the excess value of the land, buildings, and machinery over book values		69, 507. 06
(2) Mayer's interest in the Reserves as of Dec. 31, 1916		191, 362. 86
(3) Mayer's interest in the Profits earned between Dec. 31, 1916, and Apr. 6, 1917		45, 686. 31
Total amount of Mayer's interest in the German assets Apr. 6, 1917		2, 414, 056. 12
Deduct payments made to Mayer's relatives in Germany before the declaration of war		600. 00
Net amount of Mayer's interest in the German assets		2, 413, 456. 12
Value of American assets for which Mayer admits accountability		$828, 072. 72
Deduct: (1) Mayer's interest in the American assets, his interest being 20% of $828,072.72	$165, 614. 54	
(2) Mayer's interest in the German assets (M2,413,456.12) translated into dollars at the rate of exchange of $0.2382 per mark	574, 885. 25	
(3) Premium paid by Mayer for surety bond conditioned on his performance of the decree in this case	4, 000. 00	
Total to be deducted		744, 499. 79
Which leaves the Custodian's ascertained share in the American assets		[1] 83, 572. 93

[1] From this amount should be deducted an amount not yet ascertained, consisting of counsel fees and other disbursements incurred in the prosecution of the suit of *Mayer* v. *Garvan*, which amount was disallowed by the District Court but allowed by the Circuit Court of Appeals.

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED

While it is not the intention of the Alien Property Custodian to press or argue assignments of error 8, 9, and 12 (R. 157, 158), it is not his intention to waive the same, understanding that these will be fully argued by counsel for other parties to the record who have filed similar assignments of error. All other assignments of error of the Custodian may be dealt with under two headings as follows:

(1) The court erred in adopting the par of exchange as the basis of determining in dollars the credits to which Mayer was entitled in respect to the assets located in Germany, instead of using the rate of exchange existing at the time of proving the account.

(2) The court erred in crediting Mayer with the expenses incurred by him in connection with the suit of *Mayer* v. *Garvan*.

CONTENTIONS OF THE PARTIES

The Alien Property Custodian contends that while the partnership was dissolved on April 6, 1917, the partners remained in possession of the assets as partnerhip property until after the close of the war and the statement of the account among them. During this period it was the duty of each partner to conserve and liquidate these assets to the end of having them available for a settlement of their respective interests, as soon as settlement became legal, and an accounting had, all losses in

the firm property through no fault of the partners being firm losses. The rate of exchange to be adopted in adjusting the several interests was that which prevailed when the parties met and submitted their respective claims upon which the court was to state the account, namely, March 26, 1923, the date of the trial. Under these principles the result of the accounting stated in tabular form would have been as follows:

STATEMENT OF ACCOUNT FOR WHICH ALIEN PROPERTY CUSTODIAN CONTENDS

Mayer's interest in the German assets on Mar. 26, 1923, the date of the accounting (Defts.' Ex. XIII, R. 146, 147)		M18, 206, 591.2
Value of American assets for which Mayer admits accountability (R. 34)		$828, 072. 72
Deduct: (1) Mayer's interest in the American assets, his interest being 20% of $828,072.72	$165, 614. 54	
(2) Mayer's interest in the German assets (M18,206,591.22) translated into dollars at the rate of exchange of .0048¢ to the mark	873. 92	
Total to be deducted		166, 488. 46
Which leaves the Custodian's ascertained share in the American assets		661, 584. 26

The statement of account for which Mayer contends if accepted would leave nothing of the American assets for the Germans but would leave a deficit in his favor. It is based upon exchange taken at par or M. 4.20 to the dollar, a rate which did not in fact exist even as of the outbreak of war between the United States and Germany. Stated in tabular form the account for which Mayer contends may be expressed as follows:

STATEMENT OF ACCOUNT FOR WHICH RICHARD MAYER CONTENDS

Mayer's interest in the German assets as shown by the books Dec. 31, 1916			M2, 107, 499. 89
Add: (1) Mayer's interest in the excess value of the land, buildings, and machinery over book values			69, 507. 06
(2) Mayer's interest in the Reserves as of Dec. 31, 1916			191, 362. 86
(3) Mayer's interest in the Profits earned between Dec. 31, 1916, and Apr. 6, 1917			45, 686. 31
Total amount of Mayer's interest in the German assets Apr. 6, 1917			2, 414, 056. 12
Value of American assets for which Mayer admits accountability			$828, 072. 72
Deduct: (1) Mayer's interest in the American assets:			
Total American assets Apr. 6, 1916	$910, 014. 07		
Less amount paid to Laible	27, 175. 88		
Mayer's interest being 20% of	882, 838. 19	=$176, 567. 63	
(2) Mayer's interest in the German assets (M2,414,056.12) translated into dollars at the rate of exchange of 4.20 marks to the dollar		574, 775. 26	
(3) Interest on $751,342.89,[1] @ 6%, from Sept. 20, 1918, to June 7, 1922		167, 424. 24	
(4) Interest on $561,617.53,[2] @ 6%, from May 28, 1918, to Sept. 20, 1918		10, 483. 53	
(5) Premium paid by Mayer on surety bond conditioned on his performance of the decree in this case. (See R. 80)		4, 000. 00	
Total to be deducted			[1] 933, 250. 66
Which leaves a deficit of			105, 177. 94

[1] This is interest on total amount of Mayer's alleged share in both American and German assets between date of second seizure by Alien Property Custodian and date Mayer filed his purported accounting with the Custodian.

[2] This is interest on American assets seized by the Alien Property Custodian on May 28, 1918, between date of their seizure and date of second seizure by the Alien Property Custodian of American assets.

[3] To these deductions must be added an amount not yet ascertained, consisting of counsel fees and other disbursements incurred in the prosecution of the suit of *Mayer* v. *Garvan*.

ARGUMENT

I

THE COURT ERRED IN ADOPTING THE PAR OF EXCHANGE AS THE BASIS FOR DETERMINING IN DOLLARS THE CREDITS TO WHICH MAYER WAS ENTITLED IN RESPECT TO THE ASSETS LOCATED IN GERMANY INSTEAD OF USING THE RATE OF EXCHANGE EXISTING AT THE TIME OF PROVING THE ACCOUNT

(A) THE OWNERSHIP OF THE PARTNERSHIP PROPERTY WAS NOT ALTERED PRIOR TO THE ACCOUNTING

(1) The declaration of war between the United States and Germany did not alter the ownership of the partnership property in the respective countries.

The dissolution of the partnership was not produced by any act or wish of the partners. It arose by operation of law. The war prevented the continuance of the partnership relation but did not dispense with the necessity for an accounting. Until such accounting and distribution each partner had an interest in all of the firm assets, wherever situate. It is not disputed that all the rights of the enemy partners in the American assets of the firm became and still are vested in the plaintiff, and that he is entitled to this accounting. This accounting was contemplated by Paragraph 10 of the decree in *Mayer* v. *Garvan, supra.* (R. 4.)

Until war was declared on April 6, 1917, the partnership of Reis & Company was in full operation. The instant war was declared all intercourse between Mayer and his partners became illegal and

even though the war dissolved the partnership it became legally impossible to secure an accounting. Such intercourse was illegal at common law. *The Rapid*, 8 Cranch, 155; *The Julia*, 8 Cranch, 181, 193; *United States* v. *Grossmayer*, 9 Wall. 72; *Habricht* v. *Alexander*, Fed. Cas. No. 5886; *Esposito* v. *Bowden*, 22 Eng. Rul. Cas. 399; *Robson* v. *Premier Oil & Pipe Line Co., Ltd.*, (1915) 2 Ch. 124, 133.

Section 3 of the Trading with the Enemy Act approved October 6, 1917 (c. 106, 40 Stat. 411, 412), expressly prohibited such trading thereby adopting and broadening the common law rule. Section 2 of the Act defines "to trade" as follows:

> (a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.
>
> * * * * *
>
> (c) Enter into, carry on, complete or perform any contract, agreement, or obligation.
>
> (d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.
>
> (e) To have any form of business or commercial communication or intercourse with.

Such accounting remained legally impossible after the General Enemy Trade License of July 8, 1920, because that license expressly exempted from its operation—

> any trade with respect to any property which heretofore, pursuant to the provisions of the Trading with the Enemy Act as

> amended, has been reported to the Alien Property Custodian, or should have been reported to him or any property which heretofore, pursuant to the provisions of said Act the Alien Property Custodian has seized, or has required to be conveyed, transferred, assigned, delivered or paid over to him.

An accounting could not legally be had, therefore, until the state of war ended and Congress so declared on July 2, 1921. But at that time and until May 4, 1922, when the decree after mandate was entered in *Mayer* v. *Garvan,* Mayer was urgently pressing before the District Court and before the Circuit Court of Appeals his claim to all the American assets under the void instrument alleged to have been executed on February 7, 1917. That contention must necessarily have been disposed of before an accounting could be had. In that proceeding the German partners were not before the court. Evidence for an accounting was not available, and the Circuit Court of Appeals affirmed the decree of the District Court, holding—

> That upon the present state of the evidence, this court is unable to state an account as between the parties, or Richard Mayer and the Alien Property Custodian * * *.

(Par. 9 of decree in *Mayer* v. *Garvan,* R 4.)

The plaintiff, who acquired the rights of the German partners in 1918, is in no way chargeable with laches in the matter of seeking an accounting. Until May 1922, he was resisting Mayer's unfounded claim that no accounting was necessary.

It is well settled that mere dissolution—without an accounting—has no effect upon the title to partnership property. Mayer's title to the American assets was no greater after the declaration of war than before. That dissolved the partnership but did not settle its affairs. They could not be settled without an accounting. Dissolution by war does not free a party from his duty to act in good faith with respect to the rights of his partners.

In the leading American case on dissolution by war, *Griswold* v. *Waddington*, 16 Johns. 438, it was held that the partnership may be said to continue as to everything that is past until all preexisting matters are wound up and settled. See also *Douglas* v. *United States*, 14 Ct. Cl. 1; *Cramer* v. *United States*, 7 Ct. Cl. 302, 304.

In *Stevenson & Sons, Ltd.*, v. *Aktiengesellschaft, etc.*, (1918) A. C. 239, reversing in part the decision in (1917) 1 K. B. 842, it was distinctly held that the dissolution by war did not entitle the English partner to insist on the retention of his share or on taking over the enemy share at a valuation. The effect of war was not to confer on the English partner the right to purchase the enemy partner's interest in the partnership property, although he could make use of it subject to the duty of accounting for a share of the profits attributable to the use of the partnership property as distinguished from those attributable to the skill or industry of the English partner.

With respect to the equitable ownership of partnership property after dissolution and before accounting, there is therefore nothing peculiar to those cases where war produces the dissolution. The situation is governed by the familiar rules as to dissolution by death or by operation of law generally.

In *Freeman* v. *Freeman,* 136 Mass. 260, 263, 264, the court said:

> This duty of the surviving partner may not be strictly that of a trustee, but it is analogous; and he is not allowed to derive a distinct and independent personal advantage either directly or indirectly, from the use of the partnership assets, but he must manage and dispose of them with a single eye to the advantage of the partnership estate which he has to administer. * * * *That which was partnership property before the dissolution continues to be so afterwards;* * * *. The surviving partner is not allowed to divide the property in specie or to take it himself at a valuation.* (Italics supplied.)

With respect to the same sort of a situation where a partnership had been dissolved by death, this Court in *Moore* v. *Huntington,* 17 Wall. 417, 423, said:

> The defendants are credited in the schedule of N. Webb & Co. with fifty per cent of the debts due the firm, after deducting what Webb and his wife owed that firm, and in the other schedule they are credited with $100,000, both for bad debts. This may or

> may not do justice, and it may possibly be the only approximate mode of doing it. But it goes upon the ground of charging the defendants with everything at the date of the decedent's death at its value at that time. Such is not the true rule. It was a legal right of the defendants, as surviving partners, to close out the concern, collect and dispose of its choses in action, and its property, pay what it owed, and then pay over to the plaintiff her just share of what was left. They were not bound to become purchasers of the decedent's interest at a valuation. But they were bound to use reasonable diligence and care in closing out the business, and in taking care of the decedent's interest. If they used such care and diligence they are only liable for what was realized in their hands when it was done. If they did not they are liable for what might have been realized by the use of such care and diligence.

See also Lindley on Partnership (4th Ed.), 569, 666, 1015, 1016, 1041, 1046; Story on Partnership (7th Ed.), sections 328, 344, 347, 350, 355; 2 Collyer Partnership (6th Ed.), sections 623, 624; Lewin Trusts (7th Ed.), 255; *Busch* v. *Clark,* 127 Mass. 111; *Case* v. *Abeel,* 1 Paige 393, 398; *Evans* v. *Evans,* 9 Paige 178; *Wedderburn* v. *Wedderburn,* 22 Beav. 84.

That mere dissolution does not divest the partnership of its title as a partnership to its assets is also manifest from the fact that a partnership may be adjudged a bankrupt " after its dissolution and

before final settlement thereof." Section 5–a of the Bankruptcy Act of 1898 (c. 541, 30 Stat. 544, 547); *In re Coe,* 157 Fed. 308; *In re McLaren,* 125 Fed. 835. This would be a vain and useless provision unless the firm had title to assets which may pass to the trustee. Not until the firm debts are paid and accounts are taken is there any right in the individual partner to withdraw anything on account of his share in the capital or profits. *West* v. *Skip,* 1 Ves. Sr. 239, *Fox* v. *Hanbury,* 2 Cowp. 445, *Taylor* v. *Fields,* 4 Ves. Jr. 396; *Pierce* v. *Jackson,* 6 Mass. 242; *Doner* v. *Stauffer,* 1 Rawle, Penrose & Watts 198; *Crane* v. *French,* 1 Wend. 311; *Witter* v. *Richards,* 10 Conn. 37.

(2) The ownership of the partnership property was not prior to the accounting altered by the acts of the parties.

The title to the American assets of the partnership has been definitely established as being in the partnership by the decree of the Circuit Court of Appeals in *Mayer* v. *Garvan, supra.* That suit was instituted by Mayer to secure the return from the Alien Property Custodian of the American assets which had been seized. One of the contentions of Mayer in that case was that title to the American assets of the partnership vested in him at the outbreak of the war on April 6, 1917. The decree of the District Court of May 4, 1922, entered after mandate of the Circuit Court of Appeals for the First Circuit, definitely determined that the title to the assets remained in the partnership.

The decree provided that Mayer was entitled to immediate repossession of the assets seized by the Custodian to be held by him under the terms and provisions of Section 8–a of the Trading with the Enemy Act.

It was further held that Mayer had a lien on these assets for what was due him from the partnership *on an accounting* of the affairs of the partnership and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting. (R. 4.) No appeal was prosecuted from the decision of the Circuit Court of Appeals upon which the decree of the District Court making such a holding was entered. The American assets were returned to Mayer and he held them under that decree. Therefore the title to the American assets is definitely established as being in the partnership.

As to the European assets which were in the possession of the German partners, the evidence clearly demonstrates that title to them also remained in the partnership.

Edwin Reis, one of the partners, testified (R. 83) that the European partners did not take over the European assets on the outbreak of war with America. He further testified that the share of Richard Mayer of the profits was credited to him annually on the books in the private ledger at Friedrichsfeld. On cross-examination the witness testified (R. 88) that on April 6, 1917, the European

partners did nothing by way of separating Richard Mayer's assets from the assets of the firm or the other partners, but carried him on as a partner and the account showed what was due him at any time. The witness stated that the German partners did not take and put aside any assets as separate assets of Richard Mayer on April 6, 1917; that on April 6, 1917, the business that Reis & Company was engaged in in Europe was the same as before, and that business has been carried on without any break up to to-day; that they continued the partnership as if Richard Mayer were still a partner and continued to use the assets in the ordinary course of a business as if Mayer were still a partner as they still considered him. (R. 88.)

Furthermore the witness testified (R. 90) *that since April 6, 1917, down to date, the European partners have continued in the form of cash on deposit in banks a sum sufficient to pay out the capital interest of Mayer as shown by the books, and that the general partners still have such an amount in the form of cash in German marks.*

Plaintiff's Exhibit 11 contained on pages 131 to 136 inclusive, of the Record is the transcript of the private accounts of Richard Mayer in the private partnership ledger. These accounts show that after April 6, 1917, the German partners continued to carry Richard Mayer's capital interest on the books of the partnership and to credit him with the profits thereon.

No loss has resulted from the use of the firm assets in Germany by the enemy partners. On the contrary there has been a gain regularly credited to Mayer's account in the partner's ledger. (R. 131, 136.) There has also been an appreciation in the value of the unliquidated assets, as has already been shown. *The only loss has been due to the depreciation in the German currency, which, of course, was not causally related to any act of the partners.*

Mayer's attempt to charge the plaintiff, who is vested with the rights of the German partners in this accounting, with all his loss due to the depreciation in the German currency in which the value of the European assets is measured, manifestly rests upon an attempt to compel the German partners to *become purchasers of Mayer's interest at a valuation without an accounting.* It is settled by the authorities already cited, both English and American, that he was not entitled to do this. See *Moore* v. *Huntington, supra.*

The only purpose of Mayer's contention that there was an appropriation of the German assets by the German partners for their own use is to support his contention that the partners thereupon became liable to account for the property at its then valuation with interest. This familiar principle of Partnership Law was enunciated by this Court in *Clay* v. *Field,* 138 U. S. 464. In fact the Circuit Court of Appeals, in its decision in this

case (R. 152), referred to this well-settled rule, citing *Clay* v. *Field* and other cases.

The Circuit Court of Appeals, however, appears to have disregarded the modification in the application of the rule where a partner, after dissolution, has acted in good faith, and "with a view to the best interests of all concerned," and loss in partnership assets has occurred by "public war." In *Clay* v. *Field* a surviving partner who failed to liquidate the assets of the firm after dissolution of the partnership was held to be accountable for the value of the personal property of the partnership at the time of dissolution, but was not held to be accountable for the value of that portion of the partnership assets consisting of slaves whose value was wiped out by reason of emancipation. The Court, speaking by Mr. Justice Bradley, said (pp. 473–474, 476):

> The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due to them; and if he takes the responsibility of continuing the business of the firm, and using the property of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the

profits which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm. (See Lindley on Part., Book III, Chap. 10, pp. 976 to 1046, 1047, 4th ed.) The application of the rule in this case would, strictly speaking, entitle the representatives of D. I. Field to call for an account of his share in the capital of the concern at the time of his death, with lawful interest. This is what they do demand as regards the personal property, which was appraised at $33,663, one-half of which, with the interest thereon, they claim should be accredited to the estate of D. I. Field. But this personal property consisted almost wholly of the slaves on the plantation; and the court below charged C. I. Field and his estate with the value of their service as long as they continued slaves, as well as with reasonable rent for the real estate during the whole period from the death of D. I. Field, except the years 1863, 1864 and 1865, when the war was flagrant.

Under such anomalous circumstances and such unexpected events, it seems hardly just to visit upon a surviving partner, acting in good faith and with a view to the best interests of all concerned, the strict consequences of the rule. In our view, equity, when called upon to settle the mutual rights of the parties, may very properly mitigate the hardships of the rule, especially when,

> as in this case, the loss has occurred by public war.
>
> * * * * *
>
> We think, therefore, on the whole, that the judge presiding in the court below adopted the proper course in disallowing the claim for the value of the slaves, and charging C. I. Field and his estate with the fair rental value of the property, including that of the slaves as long as they were slaves, and crediting them with the taxes paid and the permanent improvements. He could not do more without making the law an engine of hardship and severity; he could not do less without disregarding its plain principles.

There is a striking analogy between the loss of the value of the slaves in the *Clay case* and the loss resulting from the depreciation of the German currency in which the European assets of this partnership were measured, and of which they chiefly consisted. The loss in each case occurred without fault or neglect on the part of any of the partners in whose possession the assets were, but was due to the effect of "a public war."

(B) THE CONDITIONS EXISTING SUBSEQUENT TO APRIL 6, 1917, AND PRIOR TO THE FILING OF THE BILL OF COMPLAINT IN THIS SUIT RENDERED ALL LOSSES TO PARTNERSHIP ASSETS, NOT DUE TO THE NEGLECT OR FAULT OF ANY PARTNER, A PARTNERSHIP LOSS

The discussion under sub-heading A has demonstrated the legal impossibility of communication between the American partner and the German partners at all times subsequent to the dissolution

of the partnership, that is, subsequent to the outbreak of war between the United States and Germany, and prior to the end of the war on July 2, 1921. Subsequent to July 2, 1921, and until May, 1922, the litigation of *Mayer* v. *Garvan* was undetermined and prevented a statement of accounts. An accounting showing the final distributive share of the parties can now for the first time be stated. During the period subsequent to April 6, 1917, the German partners and Mayer could do nothing more than hold the assets in their respective possessions and conserve them until such time as an accounting became legally possible. Under such circumstances depreciation of any partnership assets in the possession of any of the partners, in the absence of neglect or fault on his part, cannot be charged against his share in the partnership assets when the account is had. In other words, the depreciation occurred with respect to the assets in possession of the Germans whose retention of these assets did not affect the title thereto. The condition of these assets in Germany, and the duty of the German partners with respect thereto, therefore become important.

On April 6, 1917, nearly 95 per cent of the European assets of the firm were either cash or quick assets, which were turned into cash in the year 1917. (R. 85.) This cash was in the form of German paper marks. There was no gold currency in Germany then, nor had there been since 1914.

(R. 85.) The paper currency had been legal tender since the statutes of August 4, 1914. (R. 98, 99.) The firm bank deposits represented a right to withdraw only this paper currency. The securities and bills receivable were, of course, payable in currency. The merchandise was sold therefor. Except for the comparatively small items of plant and machinery, the depreciation in the German currency meant a corresponding depreciation in the value of the partnership assets in Europe. Mayer is the equitable owner of 20 per cent of those assets until his rights have been determined by the accounting in this proceeding. The exact amount of his distributive share is here to be settled. Until that determination and settlement, the gains and losses from the fluctuations in the value of the assets, whether tangible property or marks or dollars, equitably belong to all the beneficial owners thereof. The American assets represent a certain number of dollars. The German assets represent a certain number of marks. Mayer's beneficial interest is approximately 20 per cent of those marks as it is 20 per cent of the dollars which measure the American assets. His lien is to secure the payment of his interest in both funds on an accounting. The amount must be translated into dollars as the basis of the decree, since an American court can give judgment only in dollars. *The Edith,* Fed. Cas. No. 4281. But the decree must none the less be for the actual value of the marks which it represents, not for some fictitious or historical value.

Since the decree is to be stated in dollars, it is appropriate to describe what has happened to the German assets as depreciation. It is, of course, true that if the account were stated in the language of the partnership agreement, in the language of the majority partners, the assets in Germany have not depreciated but the American assets have appreciated. If this account were to be settled in the normal way, at the home office of the firm in Germany or by a German court, as Mayer stipulated to settle differences with his partners (Agreement, Par. 15, R. 11), the value of the American assets would be translated into marks for that purpose. The appreciation would be enormous. Money is the domestic yardstick of values. Internationally it is a commodity, like any other. Its value fluctuates according to economic laws. The only difficulty here is that the comparative value of German and American money has changed violently since this partnership was dissolved and before it was possible to settle its affairs. This change must here be regarded as a *depreciation* of the German assets.

It is clear that this depreciation was not due to any fault or neglect of the German partners. *There is no suggestion that they were under a duty to transfer the German assets into other countries or other currency even if the German government would have permitted such a course.* A partner's duty, after dissolution as before, is to observe abso-

lute fairness and good faith toward his partners in dealing with partnership property. *Jones* v. *Dexter,* 130 Mass. 380; *Whitney* v. *Dewey,* 158 Fed. 385 (C. C. A.); *Betts* v. *June,* 51 N. Y. 274; *Beam* v. *Macomber,* 33 Mich. 127; *Lees* v. *LaForrest,* 14 Beav. 250; *Johnson's Appeal,* 115 Pa. 129. But he is under no liability to indemnify the firm from loss caused by an honest error in judgment. If his act is not wanton or fraudulent, a partner cannot be charged with the results of lack of discretion or good judgment. *Charlton* v. *Sloan,* 76 Iowa 288; *Knipe* v. *Livingston,* 209 Pa. 49; *Fordyce* v. *Shriver,* 115 Ill. 530.

The position taken by Mayer may fairly be illustrated by an analogy. Assume that A and B were partners and that the entire assets of the firm consisted of 200 sheep. A resides in the United States and B in Germany. On April 6, 1917, when war was declared, A had 100 sheep in his possession and B had 100 sheep in his. The flocks of sheep were of equal value. B, the partner in Germany, cared for the flock of sheep in his possession to the best of his ability, but before the war ended and an accounting became possible all but ten of B's flock of sheep were requisitioned and confiscated by the German Government without compensation for use in feeding the German Army. The sheep in A's possession in America are alive and healthy. Assume that in a suit for accounting A says, as Mayer says in this case, " on dissolution of the firm I took over this flock of sheep as my

own, subject only to a duty to account for any excess value this flock of sheep *then* had over the flock of sheep in your possession. There was then no excess. Your share on accounting is the ten sheep which were not taken by the German Government."

In the present case there were certain assets in the United States in Mayer's possession. There were assets in Germany in the German partner's possession. By reason of the depreciation in German currency due to no fault whatsoever of the German partners, the assets in Germany have shrunk so that they are worth very little. Mayer should not on the accounting be permitted to say that the German partners substantially must suffer the loss of their share in any of the assets, because prior to the accounting those assets in their possession depreciated in value. It is submitted that such a result is inconceivable in a court of equity.

(C) THE DETERMINATION, THEREFORE, OF THE RESPECTIVE RIGHTS AND INTERESTS OF THE PARTNERS MUST BE MADE IN RELATION TO THE EXTENT AND CHARACTER OF THE PARTNERSHIP ASSETS EXISTING AT THE TIME OF THE ACCOUNTING, AND THE ADJUSTMENT OF THEIR RESPECTIVE INTERESTS IN TERMS OF DOLLARS MUST BE MADE IN RELATION TO THE RATE OF EXCHANGE THEN PREVAILING

Mayer admits himself to be chargeable with $828,072.72. (Mayer's answer, Ex. A, R. 34.) This sum represents the actual value of the property redelivered to him by the Custodian on June 7, 1922.

Mayer's share in the American assets is 20%, or $165,614.54, as the credit allowable to Mayer on account of the American assets in accordance with the decision below. (R. 72.)

As to the entire value of the European assets on March 26, 1923, the date of the beginning of the trial in this case in the District Court, the record is not entirely clear. It does appear, however, specifically from the record by uncontradicted evidence that Mayer's share of the European assets on that date was M. 18,206,591.22. (Defendants' Ex. XIII, R. 146, 147.) Since Mayer's interest in the partnership was 20% presumably the entire European assets were worth five times this amount, which would be M. 91,032,956.10. If Mayer is not chargeable with his share of the reserves disallowed by Judge Johnson, his share should be increased by M. 191,362.86, making the total figure M. 18,397,954.08. The value of these " marks " is shown by uncontroverted evidence to be .0048 of a cent each on the date as of which the value of the share was proved namely March 26, 1923. (R. 71.) *Mayer's credit on account of the European assets on March 26, 1923, when an accounting was first had in the District Court therefore was $873.92.* If the District Court was correct in holding that the reserves should not be charged against Mayer's share, this amount should be increased to $883.11.

All the partnership property in Europe, as it existed April 6, 1917, has been liquidated into Ger-

man marks except the plant at Friedrichsfeld. All except property worth M.828,516.54 out of a total of M.15,282,170.55 was liquidated and turned into marks within the year 1917. (R. 85.) The Franzenthal and Herzberg plants were later sold for the best price that could be obtained at the time (R. 83), and the full price credited on the books of the firm. With this liquidation Mayer's interest in the physical property became an interest in the Germany currency into which the property had been converted. So much of his share in the European assets as is not represented by the Friedrichsfeld plant, therefore, is not only measured in marks but it *consists* of marks. The Friedrichsfeld plant stands on a different basis, however. It is the only piece of partnership property that has not been sold. Its book value on December 31st, 1916, was as follows:

Land and buildings	M252,037.66
Plant and machinery	35,454.00
	287,491.66

(See balance sheet, R. 49.)

Its actual value on April 6th, 1917, was as follows (Ex. XIII, R. 146):

Land and buildings	M506,408
Machinery	128,620
	635,028

According to the uncontroverted evidence of Edwin Reis and of the expert and qualified appraiser produced at the trial, the *actual fair market*

value in cash of this property on March 26th, 1923, was as follows (R. 147):

Land and buildings	M36,600,000
Machinery	44,400,000
	81,000,000

All this appreciation, *which comes from the depreciation of the mark* (R. 83), is definitely shown and full credit therefor can be given Mayer in stating the account.

If the plant had been sold and the proceeds deposited in conservative banking institutions in Germany, a course which certainly could not have been criticized by the American partner, his ultimate share on accounting would be a mere fraction of the amount now credited to him. The same situation would prevail if the property had been taken over by a receiver or other disinterested liquidating officer and converted into cash. All the evidence as to market value of the property in Germany whether in 1917 or later, has referred to " the fair market price in the kind of marks that were then current, paper marks." (R. 86.)

The foregoing discussion shows definitely in marks the credit to which Mayer is entitled in respect to the assets located in Germany. As has been demonstrated these are the assets as they existed on March 26, 1923, and since prior to that time it was impossible for the partners to account for assets in their possession, these are the assets which must be considered in giving Mayer credits to which he is entitled.

It appears, however, that the amount due from Mayer to the German partners is stated in terms of German marks. In order for a court in the United States to give Mayer the credit to which he is entitled for these German marks it is necessary to translate the German marks into dollars. The District Court and the Circuit Court of Appeals adopted the arbitrary " par of exchange " in translating into dollars what they respectively found to be due to Mayer in marks.

It is respectfully submitted that there is no justification for the adoption of such a rule. Both the District Court and the Circuit Court of Appeals based their decision upon the authority of certain old cases which were characterized as " respectable authorities," principally *Adams* v. *Cordis,* 8 Pick. 260, and *Martin* v. *Franklin,* 4 Johns. 125.

Long prior to the outbreak of war between the United States and Germany the use of the par of exchange under circumstances such as the present had been largely abandoned by the courts and the prevailing rate of exchange generally adopted. See *Grant et al.* v. *Healey,* Fed. Cas. No. 5696; *Murphy* v. *Camac,* Fed. Cas. No. 9948; and *Scott* v. *Hornsby,* 1 Call (Va.), 35.

Certainly all the cases where the question of translating foreign currency into United States dollars has arisen since the outbreak of the Great War in 1914 have used the rate of exchange and

have adopted the rate of exchange as it existed at the time the obligation became due. There are many authorities to this effect. The principal ones, however, aside from a recent decision of this Court which will be mentioned presently, are *Hoppe* v. *Russo-Asiatic Bank,* 235 N. Y. 37; *Simonoff* v. *Bank,* 279 Ill. 248; *Katcher* v. *American Express Co.,* 94 N. J. L. 165; *S. S. "Celia"* v. *S. S. "Volturno"* (1921), L. R. 2 App. Cas. 544; *Di Ferdinando* v. *Simon Schmidts & Co.* (1920), 3 K. B. D. 409.

The question, however, has been settled by the recent decision of this Court in *Guinness et al.* v. *Hicks et al.,* Nos. 80 and 81, October Term, 1925, where this Court held that where there was a duty to pay an obligation in foreign currency, the amount to be paid in dollars was to be calculated at the *rate* of exchange existing at the date of the breach of the obligation or at the date when the money became due. In this case when the Court is called upon to determine in American dollars the credits to be allowed Mayer it must, in translating the credits in German marks into American dollars, adopt the rate of exchange existing as of the date those credits are determined and become due.

Strictly speaking the accounting is had in this case as of the date of the final decree in the District Court; but since at the trial it was not possible to prove the rate of exchange which would exist at the time the final decree was entered, and the evidences shows the rate of exchange as it existed on

the date the trial began, the rate of exchange to be used in translating the credit due to Mayer in marks into the credit in dollars should be the rate of exchange on the date the trial began, namely, March 26, 1923.

It is therefore respectfully submitted that in calculating in dollars the credits to be given Mayer upon the accounting which have already been determinated in marks should be the rate of exchange existing on March 26, 1923. On March 26, 1923, the date of the accounting, Mayer's interest in the German assets of the partnership amounted to M. 18,206,591.22. Adopting the rate of exchange existing at the date this credit to Mayer was determined, namely, 0.0048 to the mark, Mayer's credit is $873.92. If to this credit is added to Mayer's interest in the American assets, his total credit is found to be $166,488.46. Deducting this from $828,072.72, the amount with which Mayer is admittedly chargeable, leaves a result of $661,-584.26, and the Custodian is entitled to a decree for this amount.

II

THE COURT ERRED IN CREDITING MAYER WITH THE EXPENSES INCURRED BY HIM IN CONNECTION WITH THE SUIT OF MAYER V. GARVAN

Reference has heretofore been made to the case of *Mayer* v. *Garvan,* 270 Fed. 229, aff. 278 Fed. 27, in which Mayer, after the seizure of the assets of the partnership in the United States sued the Alien Property Custodian to secure the return of those

assets. The District Court directed the return of the assets to Mayer and on appeal the Circuit Court of Appeals for the First Circuit substantially affirmed the decree of the District Court.

In all of those proceedings Mayer was claiming adversely to the German partners. The decree of the court awarded him possession of the American assets because the court found that he had a lien upon the partnership assets under Section 8–a of the Trading with the Enemy Act (c. 106, 40 Stat. 411, 418), which provides as follows:

> That any person not an enemy or ally of enemy *holding a lawful mortgage, pledge, or lien,* or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and

> such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally. (Italics supplied.)

While the Government does not agree with the construction placed by the Circuit Court of Appeals upon Section 8–a, the decision of that court is the law of this case and demonstrates the nature of Mayer's claim in the suit.

At the conclusion of the Circuit Court of Appeals phase of *Mayer* v. *Garvan,* instead of the Alien Property Custodian pressing an appeal to this Court an arrangement was made whereby if the property was turned back and decree made final, Mayer would give a surety bond for $400,000 conditioned to perform any such decree as might be entered in the present case, with the stipulation in the bond that the amount should not be taken as indicative of the claim of either party; that is, the Government was entitled to claim that the liability was more than $400,000, and the sum in the bond was not to be taken as any demand by Mayer that it was in such amount. The bond contained no stipulation as to who should pay the premium thereon. Mayer paid $4,000 as a premium. (R. 80.) It is Mayer's contention that he is entitled in the partnership accounting to charge the amount of this premium against the partnership assets thereby causing the German

partners to pay 80% thereof. The District Court disallowed the amount of the premium as a credit to Mayer. This was reversed by the Circuit Court of Appeals.

In *Mayer* v. *Garvan* the court did not return the property to Mayer because it was partnership property but returned the property to Mayer because Mayer had a personal claim against the property, namely, his claim to subject the property to the payment of his interest in the partnership. The court, therefore, recognized the fact that Mayer's suit was essentially in furtherance of a personal claim and not for the purpose of protecting partnership assets as such. It was a lien of Mayer personally.

After the conclusion of *Mayer* v. *Garvan* in the Circuit Court of Appeals, under the provisions of the Judicial Code as they then were the Custodian possessed an absolute legal right to prosecute an appeal to this Court. Mayer as an individual, and in furtherance of his personal and individual interest, made a contract with the Custodian that in consideration of the Custodian giving up his right to appeal, Mayer would furnish a bond for the faithful performance of his obligation to account under the decree in that case. This legal right the Custodian gave up and Mayer, in consideration of that, furnished the bond. If the Custodian now is to be compelled to pay the premium for that bond, he is being deprived of at least a part of his consideration for forfeiting his right to appeal.

Mayer's counsel fees and other disbursements in *Mayer* v. *Garvan* were incurred on his own account in the assertion that the American assets of the firm were his individual property, and in support of the return of the property pursuant to Section 8 (a) of the Trading with the Enemy Act. At no time in *Mayer* v. *Garvan* was there involved a partnership right. It was a proceeding in derogation of the rights of the plaintiff and of the German partners. Counsel fees in such a case were not proper charges against his adversaries. It is respectfully submitted that the disallowance thereof was clearly right, and that the court had no authority to order such payment. *Grant* v. *Fletcher,* 283 Fed. 243, 274.

III

THERE WAS NO ERROR IN FAILING TO ALLOW MAYER INTEREST ON HIS DISTRIBUTIVE SHARE

Mayer in his appeal in case No. 233 asserts that the Circuit Court of Appeals erred in only one particular, namely, that it should have allowed him interest or other compensation for loss of use of the property taken without right by the Alien Property Custodian in 1918, claiming it as the property of Mayer's former German partners, and until its return in 1922. Neither the District Court nor the Circuit Court of Appeals allowed Mayer interest on his distributive share.

Mayer seeks to charge the Custodian with interest for the period when the Custodian held the

property. It is to be noted, as the District Court found, that the sum which has been returned to him by the Custodian "includes income earned while in the Custodian's hands in which both he and his partners share upon distribution." (R. 71, 72.) This fact is not disputed and he has acknowledged full satisfaction of the decree requiring the delivery to him of all the property seized "and its proceeds."

It is not clear to the Government upon what theory Mayer now claims to be entitled to interest. Manifestly it is either a claim against his partners or it is a claim against the plaintiff as an officer of the United States acting in his official capacity. In either case it is submitted that the claim must be rejected.

(A) MAYER IS NOT ENTITLED TO CHARGE INTEREST AS AGAINST HIS GERMAN PARTNERS

It is of course familiar law that a partner is not entitled to interest on capital which he contributes to the firm unless the partners have agreed that he shall have interest. *Hill* v. *King,* 8 L. T. Rep. (N. S.) 220; *Cooke* v. *Benbow,* 68 Eng. Ch. 1; *Ewing* v. *Ewing,* L. R. 8 A. C. 822; *Hart* v. *Hart,* 117 Wis. 639; *Smith* v. *Smith,* 18 R. I. 722.

And even where an agreement for interest on such capital exists, it is not recoverable after dissolution of the firm unless there is a special stipulation to that effect. Bradley v. *Brigham,* 137 Mass. 545; *Johnson* v. *Hartshorne,* 52 N. Y. 173, and other cases cited; 30 Cyc. 443.

It is the policy of courts in this country to require strict proof of such an agreement. *In re James,* 146 N. Y. 78, *Jones* v. *Jones,* 36 N. C. 332, and *Daniels* v. *McCormick,* 87 Wis. 255

Interest is not allowed upon partnership accounts generally until after a balance has been struck on a settlement between the partners. *Miller* v. *Lord,* 11 Pick. 11, 26, *Dexter* v. *Arnold,* 3 Mason 289, Fed. Cas. No. 3855, *Boddam* v. *Ryly,* 1 Bro. Ch. 239, *King* v. *Hamilton,* 16 Ill. 190, and *Bayly* v. *Becnel,* 30 La. Ann. 75.

In *Smith* v. *Knight,* 88 Ia. 257, there were mutual promises by partners to pay interest on monthly balances already accrued. These promises were held to be without consideration, there being no provision for such interest in the partnership agreement. An agreement to pay interest where by law interest was not payable was held to be in effect an agreement by one partner to make a gift to the other.

Under the partnership agreement the capital of the partners bore interest at 4½ per cent. (R. 9.) *There was no provision or stipulation for interest after dissolution.*

(B) MAYER IS NOT ENTITLED TO INTEREST AS AGAINST THE PLAINTIFF

If Mayer is not entitled to have interest paid out of the German partners' share of the assets, which will go to the Alien Property Custodian, the only other source from which interest could be paid

would be the Treasury of the United States. The plaintiff is prosecuting this suit in his official capacity as Alien Property Custodian. It will not be insisted that he personally should pay such interest. If interest is to be paid it is by the Government of the United States that it must be paid. It is well settled that the United States is not liable for interest in the absence of express statutory provision therefor. *United States ex rel. Angarica* v. *Bayard,* 127 U. S. 251; *Gordon* v. *United States,* 7 Wall. 188; *United States* v. *Verdier,* 164 U. S. 213.

It appears, therefore, that neither the plaintiff as an officer of the Government, nor the German partners can properly be charged with interest.

CONCLUSION

From the foregoing it appears—

(1) That the court erred in adopting the par of exchange as a basis of determining in dollars the credits to which Mayer was entitled in respect to the assets located in Germany, and that the court should have adopted the rate of exchange existing at the time of the proving of the account.

(2) That the court erred in crediting Mayer with the expenses incurred by him in connection with the suit of *Mayer* v. *Garvan.*

(3) That Mayer is not entitled to interest on his distributive share in the partnership.

It, therefore, follows that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court with instruc-

tions to enter a decree in favor of the Alien Property Custodian in conformity with the principles of law herein set forth.

Respectfully submitted.

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MARCH, 1926.

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